

## ARTICLES

### Custom and Public Trust: Background Principles of State Property Law?

by David L. Callies

*Editors' Summary: In Lucas v. South Carolina Coastal Council, the U.S. Supreme Court held that regulations that deprive a landowner of economically beneficial use of land are compensable under the Fifth Amendment unless the regulation in question either prevents a nuisance or is part of a state's "background principles" of property law. While nuisance law is fairly well understood, the second exception to the rule of compensation is not. This Article examines the law of custom and the public trust doctrine and describes the extent to which they have been applied in the common law, both in England and in the United States. The author notes that should public trust and customary law become, as some courts have suggested, background principles of state property law, the Lucas "categorical rule" of compensation could be significantly limited in scope, leaving affected landowners with no Fifth Amendment recourse.*

In 1992, the U.S. Supreme Court set out its now-famous "categorical rule" on regulatory takings in *Lucas v. South Carolina Coastal Council*.<sup>1</sup> From that date onward, any regulation that leaves a landowner without any "economically beneficial use" of land is a taking, requiring compensation under the U.S. Constitution's Fifth Amendment. The landowner receives compensation regardless of the circumstances under which the landowner acquired the land or the reason the government gives for imposing the regulation.

Two exceptions, however, exist to this "categorical rule": (1) if the regulation prevents a nuisance, or (2) if the regulation is part of a state's background principles of property

law.<sup>2</sup> The first presents very little difficulty. The law of nuisance is full and comprehensive, as well as comprehensible. Even the nonlawyer has a pretty good idea of what constitutes a nuisance. Leaving nothing to chance, the Court provided us with two examples: constructing a power plant on an earthquake fault line and filling part of a lake bed so as to increase flood damage to one's neighbor.<sup>3</sup>

With regard to the second, the "background principles of state property law," the Court failed to give so much as a hint, let alone an example, of what it had in mind. Commentary following *Lucas* suggested applicable background principles emanating from comprehensive state statutes<sup>4</sup> to legislative declarations of property. Nonetheless, it is more than likely that the Court had something more fundamental in mind, given the language in the decision deriding creative legislative purpose-writing and the ease with which legislatures convert benefit-creation to harm-prevention, the former requiring compensation and the latter allegedly not requiring compensation. Certainly, the few cases that attempt to excuse total takings in whole or in part on the *Lucas*

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1. 505 U.S. 1003, 22 ELR 21104 (1992).

2. *Id.* at 1020-32, 22 ELR at 21108-11.

3. *See id.* at 1029, 22 ELR at 21111.

4. ROBERT MELTZ ET AL., THE TAKINGS ISSUE ch. 14 (1999). *See also* M & J Coal Co. v. United States, 47 F.3d 1148, 25 ELR 20600 (Fed. Cir. 1995) (holding in part that a state statute restricting the mining of coal to increase what the owner had to leave in the ground was a background principle of state property law; *Hanziken v. Fong*, 519 N.W.2d 367 (Iowa 1994) (holding a state statute requiring a Native American burial mound to be left undisturbed, thereby denying the landowner a building permit for development on farmland, was a background principle of state property law under *Lucas*, even though the statute predated the purchase of the property by a mere 10 years).

"background principles" exception go beyond such simplistic declarations.<sup>5</sup>

Although the Court provided no explicit guidance in defining background principles of state property law, at least two areas, the subjects of this Article, come readily to mind: the law of custom<sup>6</sup> and the law of public trust.<sup>7</sup> Both are rooted in a common principle stated by the *Lucas* Court: whether nuisance or background principle, the restriction is part of the landowner's title "to begin with."<sup>8</sup> Cognizable analogues exist. Property owners often acquire fee simple interests subject to the interests of another, such as easements, profits, and licenses. While most of these kinds of interests are generally recorded interests, readily ascertainable from a certificate or chain of title, some are not. Prescriptive easements are one such example. Restrictive covenants are another. Most of these rights are personal. Virtually no case provides for easements in favor of the public as a whole, or a prescriptive right in favor of a large class of people. Custom and the public trust doctrine, however, are different.

Customary rights inhere in at least an entire definable community, although usually to use a particular parcel of land rather than all land similarly situated. Land impressed with a public trust extends further yet, giving the public certain rights over water or waterfront land—again usually a particular parcel or waterway, although increasingly an entire section thereof—rather than a discrete segment. Under both theories, the landowner may not necessarily know in advance of such a customary or public trust right unless someone asserts it. Moreover, neither a recording nor a Torrens System is usually of any help, unless a title insurance company notes possible exceptions in its policies, as in

5. For nuisance exceptions, see *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025 (Colo. Ct. App. 1996) (holding mining company had no right to degrade the environment at one of its mining sites under Colorado nuisance law); *M & J Coal Co.*, 47 F.3d at 1148, 25 ELR at 20600 (holding coal company had no right to conduct nuisance-like activities while surface mining in West Virginia). For a background principles exception with nuisance overtones, see *Colorado Dep't of Health v. The Mill*, 887 P.2d 993 (Colo. 1994) (en banc) (holding federal statutes restricting the disposition of uranium mine tailings fell within the background principles exception so as to deny a landowner use of a 61-acre parcel, even though the applicable statutes were enacted after the landowner acquired the property). See also TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *Dolan* and *Lucas* 2 (David L. Callies ed., 1996). For a collection of recent exemption cases (and a summary of recent takings law generally), see MELTZ ET AL., *supra* note 4, at ch. 14 and David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed From Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523 (1999).

6. For a thorough analysis of custom, including its application to takings, see David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996) and Paul Sullivan, *Traditional and Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawaii*, 20 U. HAW. L. REV. 99 (1999). For recent analysis of customs and public trust in the context of exceptions to the *Lucas* categorical rule on regulatory takings, see Callies, *supra* note 5, at 558-62; MELTZ, *supra* note 4, at ch. 14; James G. Titus, *Rising Seas, Coastal Erosion and the Takings Clause: How to Save Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279, 1361-83 (1998); and Marc R. Poirier, *Regulatory Takings*, in ENVIRONMENTAL PRACTICE GUIDE (1999).

7. See COASTAL STATES ORGANIZATION, INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (2d ed. 1997); JACK H. ARCHER ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS (1994).

8. *Lucas*, *supra* note 1, 505 U.S. at 1027, 22 ELR at 21110.

Hawaii with respect to customary native rights. This raises the danger posed by John Chipman Gray concerning the growth of a new class of "perpetuities" which no one has the power to abate, clouding titles more or less forever.<sup>9</sup> These critical jurisprudential issues aside, the following section addresses the basic elements of public trust and customary law. Should they become, as a few courts suggest, accepted background principles of state property law, public trust and customary law will become exceptions to the *Lucas* categorical rule that a taking of all economically beneficial use by government regulation requires compensation under the Fifth Amendment.

## Custom, Background Principles, and Takings

If custom is to represent a background principle, thereby shielding a custom-based land use regulation from takings challenges, it is useful to understand the commonly used definition of custom. What courts have traditionally done with assertions of customary rights provides some guidance. Given the courts' increasing reliance on Blackstonian principles of custom, an exposition of what that English custom meant is critical. Finally, an assessment of what courts today are doing with such Blackstonian custom is both important and troubling.

### Early U.S. Cases

Until recently, one could fairly characterize the U.S. judicial reception to custom as a source of law as decidedly chilly. Dealing mostly with easements, the few early decisions found little, jurisprudentially or philosophically, to attract them to the English doctrine of custom. Due in part to the prevalence of recording systems early in the history of the country, unrecorded clouds on title based on immemorial custom would be anathema. As the legendary John Chipman Gray so aptly commented in his definitive treatise on the rule against perpetuities:

The objection which exists to allowing profits a prendre by custom really applies, though in a less degree, to allowing easements by custom. . . . In a country like most parts of America, where a population, sparsely scattered at first, has rapidly increased in density, such rights might become very oppressive. The clog that they would put on the use and transfer of land would far outweigh any advantage that could be acquired from them. Especially it should be remembered that they cannot be released, for no inhabitant, or body of inhabitants, is entitled to speak for future inhabitants. Such rights form perpetuities of the most objectionable character.<sup>10</sup>

As one might expect, difficulty arose with the term "immemorial." The case law best demonstrates this difficulty.<sup>11</sup> "[A]t this day and in this age, in a government like ours, there can be little need of a resort to such a source as custom for legal sanction."<sup>12</sup> Furthermore,

The political and legal institutions of Connecticut have from the first differed in essential particulars from those

9. See generally JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES (1942).

10. *Id.* §586.

11. Bederman, *supra* note 6, at 1398; see also Sullivan, *supra* note 6.

12. *Delaplane v. Crenshaw & Fisher*, 56 Va. (15 Gratt.) 457, 475 (1860).

of England. Feudalism never existed here. There were no manors or manorial rights. A recording system was early set up, and has been consistently maintained, calculated to put on paper, for perpetual preservation and public knowledge, the sources of all titles to or [e]ncumbrances affecting real estate. Nor have we all the political subdivisions of lands which are found in England . . . a city, county, town, hamlet, burgh, vill, manor, honor, or hundred. . . . Most of these terms denote forms of communities that are unknown in this state. Under our statute of limitations, also, rights of way may be established by a shorter user than that required by the English law.<sup>13</sup>

Finally, a New Jersey court refused to permit inhabitants of a town an easement to reach a riverbank, based on custom.

[I]f [this] custom . . . is to prevail according to the common law notion of it, these lots must lie open forever to the surprise of unsuspecting owners, and to the curtailing [of] commerce, in its more advanced state, of the accommodation of docks and wharves, when perhaps a tenth part of the lots now open would be all sufficient as watering places; a principle of such extensive operation ought not to be strained beyond the limits assigned to it in law. If [the] public convenience requires high[ways] to church, school, mill, market or water, they are obtainable in a much more direct and rational manner under [] statute than by way of immemorial usage and custom.<sup>14</sup>

Other courts simply found that the "immemorial" feature could not transfer to America.<sup>15</sup>

A few states adopted some form of customary law, even though a close examination indicates less than a full embrace. In *Galveston v. Menard*,<sup>16</sup> the Texas Supreme Court noted only the possibility of vesting a property right by immemorial custom, but refused both to apply it in the case before it or to extend its application to Texas. In *Waters v. Lilley*,<sup>17</sup> the Supreme Judicial Court of Massachusetts noted that the right to fish, a right claimed by custom on another's land, was a profit and not an easement which would have made it impossible to claim as a custom in England. A subsequent Massachusetts case, however, confirmed the potential existence of customary easements without specifically finding one in that case.<sup>18</sup>

In two New Hampshire cases, the court initially refused claims of customary rights to enter private property to carry away sand and to collect seaweed on the grounds that both were profits to which the law of custom could not apply (forcing plaintiffs to rely upon prescriptive rights).<sup>19</sup> But the New Hampshire court finally made explicit this implied recognition of the possibility of an easement through custom in *Knowles v. Dow*.<sup>20</sup> "[U]nexplained and uncontradicted [testimony] is sufficient to warrant a jury in finding the existence of an immemorial custom" even if only for something more than 20 years.<sup>21</sup> More recently, Idaho recognized that

the law of custom had limited acceptance in the state, but refused to permit the establishment of such a right unless *all* of Blackstone's seven criteria were met.<sup>22</sup> Finding six of the seven missing, the court further noted that over a half-century of use was not "time immemorial" for the purposes of custom.<sup>23</sup>

Then in Oregon the state supreme court found custom as the basis for allowing all the citizens of the state to go upon all dry sand areas along the Pacific coast of Oregon, private or not, resulting in the inability of private landowners in these areas to build anything that would obstruct such access though this proposition was neither briefed nor argued by the parties.<sup>24</sup> According to the court:

Because so much of our law is the product of legislation, we sometimes lose sight of the importance of custom as a source of law in our society. It seems particularly appropriate in the case at the bar to look to an ancient and accepted custom in this state as the source of a rule of law. The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his.<sup>25</sup>

The court cited Blackstone as a basis for its decision, claiming that its decision "meets every one of Blackstone's requisites."<sup>26</sup> The Hawaii Supreme Court upheld the rights of native Hawaiians to exercise "traditional and customary" rights on any land in the state, whether private or public, again on customary law grounds, citing Blackstone.<sup>27</sup>

It may very well be possible to interpret the common law of the several states so as to create such property rights without reference to custom (though it is doubtful such creation could withstand federal judicial scrutiny under the Fifth Amendment's takings clause) but the fact remains that the courts did not. Custom—Blackstonian custom—becomes the ultimate bedrock, the last defense, of each decision. One suspects the courts understood they are on thin ice indeed in breaching the fundamental right of the private landowner to exclude others.<sup>28</sup> Only if the right is somehow preexisting—a background principle of state property law, for example—can the courts avoid a taking, on the obvious ground that one takes title to private property as one finds it, customs, background principles, and all. A court decision or legislative declaration of such rights takes nothing from a landowner if, based on such preexisting limitations or background principles, the landowner had no such rights in his or

13. *Graham v. Walker*, 61 A. 98, 99 (Conn. 1905).

14. *Ackerman v. Shelp*, 8 N.J.L. 125, 130-31 (1825).

15. See, e.g., *Harris v. Carson*, 34 Va. (7 Leigh) 632, 638 (1836); *Ackerman*, *supra* note 14; *Delaplane*, *supra* note 12.

16. 23 Tex. 349 (1859).

17. 21 Mass. (4 Pick.) 145 (1826).

18. See *Jones v. Percival*, 22 Mass. (5 Pick.) 485 (1827).

19. See *Perley v. Langley*, 7 N.H. 233 (1834); *Nudd v. Hobbs*, 17 N.H. 524 (1845).

20. 22 N.H. 387 (1851).

21. *Id.*

22. *State ex rel. Haman v. Fox*, 594 P.2d 1093 (Idaho 1979).

23. *Id.* at 1101-02.

24. *Oregon ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969). See also *Stevens v. City of Cannon Beach*, 854 P.2d 449, 24 ELR 20913 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994) (Scalia, J., dissenting). Indeed, in his stinging dissent, Justice Scalia declared it was an "understatement that this case raise[d] a serious Fifth Amendment takings issue." *Id.* at 1335. See generally *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970); Lew E. Delo, *The English Doctrine of Custom in Oregon Property Law*, 4 ENVTL. L. 383 (1974).

25. *Oregon ex rel. Thornton*, 462 P.2d at 671.

26. *Id.* at 677.

27. *PASH v. Hawaii County Planning Comm'n*, 903 P.2d 1246 (Haw. 1994).

28. See *Kaiser Aetna v. United States*, 444 U.S. 164, 10 ELR 20042 (1979); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 17 ELR 20918 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 24 ELR 21083 (1994); and commentary, *inter alia*, in David L. Callies, *Regulatory Taking and the Supreme Court*, 28 STETSON L. REV. 523 (1999).

her bundle of rights (the famous Holfeldian bundle of sticks example) in the first place.<sup>29</sup>

Clearly this emphasis on customary law—and in particular Blackstonian custom—requires an investigation of what Blackstone meant in his commentaries by the term “custom.” Of particular importance are the seven criteria which make such a custom “good,” for if courts are going to decide property rights cases on the basis of such custom, then they must either adopt it as they find it (that’s the point of precedent, surely) or, if different, tell us why certain of the criteria are inapplicable. The elimination of a fundamental private-property right—the right to exclude—demands no less. What Blackstone, and the contemporary English courts, meant under each of these criteria is the major thrust of the following section.

### *Blackstonian Custom: What It Is and Why We Should Care*

Customary law is in derogation of that greatest of English gifts to the regulation of human behavior, the common law. Extolled on at least three continents as the epitome of fairness and consistency, common law permits the changing of law to reflect common social beliefs and attitudes by accretion rather than by avulsion. Although there is the occasional overruling of precedent, the norm is gradual change through multiple judicial decisions.

It is the common law that formed the basis of legal jurisprudence in the American colonies in the 17th century, and in the new United States in the 18th century. In the latter, reception statutes passed in the various states resulted in the formal adoption of English common law as the basis for legal proceedings. The repository of that common-law tradition was William Blackstone’s *Commentaries on the Laws of England*.<sup>30</sup> Although there are at least 16 editions of the *Commentaries*, it is generally recognized that the first edition of 1765-1769 was the most influential in the United States.

Blackstone wrote his commentaries at least in part as a polemic in favor of the common law, and to buttress it against anything that might serve to weaken it. It is against this context that his commentaries on custom must be read. Indeed, Blackstone recognized three forms of customary law: common law (“general custom”) by which he presumably meant common law as we view it today, court (procedural) custom of particular tribunals or courts, and “particular customs” practiced by and affecting the inhabitants of a defined geographical area. It is this third, or “particular,” custom which Blackstone took care to carefully define and delimit, arguably because he viewed it as a threat to the common-law tradition which he espoused and for which he argues in the *Commentaries*. He set out seven criteria which a customary right or practice must meet if it is to be a “good” custom, that is, one which is enforceable against a common-law principle or tradition, say, of exclusive possession of private land, a situation in which many of the disputes over custom arose, as we shall see. But Blackstone did not draw these seven principles from the air. Although he cited comparatively few cases, he was declaring the law pretty much as it had developed by the middle of the 18th century,

and indeed, as it continued well into the 19th century. To be valid, to be enforceable, to result in a right of an individual despite common-law principles to the contrary, a custom had to be immemorial, continuous, peaceable, reasonable, certain, compulsory, and consistent. Even today, the law of custom is hedged around by requirements, most of which derive directly from Blackstone’s seven criteria. Thus, for example, a recent volume of *Halsbury’s Laws of England*<sup>31</sup> describes the essential attributes of custom as follows:

To be valid, a custom must have four essential attributes: (1) it must be immemorial; (2) it must be reasonable; (3) it must be certain in its terms and in respect both of the locality where it is alleged to obtain and of the persons whom it is alleged to effect; (4) it must have continued as of right and without interruption since its immemorial origin. These characteristics serve a practical purpose as rules of evidence when the existence of a custom is to be established or refuted.<sup>32</sup>

Even so practical a source as a standard reference book of law for local government councilors has the following entry:

#### Custom

If a right is given to or an obligation imposed upon all the Queen’s subjects, it must be established by authority of the general law. A local custom can therefore never be general and a customary claim in the name of the general public will fail. Similarly a custom must be capable of definition, and so the courts will not uphold a claim on behalf of a class whose membership cannot be ascertained.<sup>33</sup>

It is the seven rules or criteria applicable to particular (not common law, not special court rules, but land rights in derogation of common law particular to a particular and limited jurisdiction and exercised by a small and definite population) custom which courts have dealt with and which form the basis still for English discussion and categorization of customary law.<sup>34</sup> The following discussion takes them in the order in which Blackstone presents them in his commentaries, though clearly for purposes of American adoption and usage, some of the criteria—such as immemoriality as Blackstone would define it—must be modified to fit a country whose common-law experience makes the application of certain criteria somewhat difficult.

#### Immemoriality

That it have been used so long, that the memory of man runneth not to the contrary. So that if any one can shew the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist.<sup>35</sup>

The use of a custom “so long that the memory of man runneth not to the contrary” is a criterion honored as much in the breach in current English cases as in its ancient purity.

31. 12 (1) HALSBURY’S LAWS OF ENGLAND (1998).

32. Para. 606, at 160. This entire section on custom is a superb explanation of custom today, prepared by one of the preeminent scholars in legal history, Professor J.H. Baker, Fellow of St. Catherine’s College, Cambridge.

33. CHARLES ARNOLD-BAKER, LOCAL COUNCIL ADMINISTRATION (4th ed., Butterworth’s, London 1994), at 35.

34. 12 (1) HALSBURY’S LAWS OF ENGLAND (1998).

35. 1 WILLIAM BLACKSTONE, COMMENTARIES \*76-77.

29. See majority opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 22 ELR 21104 (1992).

30. 1 WILLIAM BLACKSTONE, COMMENTARIES \*57 (Bernard C. Gavit ed., 1941).

However, for centuries, "time out of memory" had a fixed, well-defined, and accepted meaning. The phrase is a common one in setting up a custom as a defense against what would otherwise be an unlawful act.

The notion of immemoriality was not only taken seriously by the courts in Blackstone's time, but the definition of immemoriality was clear and unequivocal. Nothing demonstrates this rigid attachment better than the 1769 case of *Millar v. Taylor*,<sup>36</sup> an old copyright case which turned on the immemoriality of an alleged custom of a company to have sole rights to publish a book once registered with it. The custom was held bad because "[v]ery certainly, it could not be immemorial: for, the art of printing was not known in this kingdom till the reign of Ed.4."<sup>37</sup> A note following the case indicates that, so far as the court knew, "[t]he first work that is known to have a date to it, was the Psalter published in Mentz, in 1457."<sup>38</sup> Why is this dispositive? Because by the accepted legal definition of immemoriality a custom had to be traceable back to the coronation of Richard I in 1189! In short, immemoriality must be provable as an empirical fact, not simply as an assertion.

However, courts were not unreasonable, even in Blackstone's time, in precisely defining the custom. In the 1795 case of *Fitch v. Rawling*,<sup>39</sup> the court had no difficulty in finding that parishioners could play cricket under a custom for "all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in the close<sup>40</sup> of A. at all seasonable times of the year at their free will and pleasure."<sup>41</sup> Clearly there was no cricket in 1189. One of the judges simply observed that "[t]he lord might have granted such a privilege, as is claimed by the first custom, before the time of memory."<sup>42</sup> Such was the law with respect to the criterion of immemoriality in Blackstone's time, and therefore at the time of English common-law adoption in the United States at the end of the 18th century.

However, it is also clear that as the coronation of Richard I faded ever deeper in the history of England, it was harder and harder to show that a custom dated from 1189—or anything like. Therefore by the mid-19th century, this criterion of immemoriality was reduced to a presumption that, once established, shifted the burden to the one attacking the custom to show by evidence that it was not immemorial. This shift is clearly apparent in a number of 19th century cases. However, even then, some notes in ancient practice or exercise of the customs right claim, was required.

Perhaps nowhere is this more clear than in the 1837 case of *Bastard v. Smith*,<sup>43</sup> an action for trespass for breaking and entering certain closes and trenching through a lawn in order to divert water to a tin mine. To the claim that the custom could not be proved to be immemorial, the redoubtable Chief Justice Tindal observed in summing up to a jury:

Then, as to the proof of the custom, you cannot, indeed, reasonably expect to have it proved before you, that such

a custom did in fact exist before time of legal memory, that is, before the first year of the reign of Richard I; for if you did, it would in effect destroy the validity of almost all customs: but you are to require proof, as far back as living memory goes, of a continuous, peaceable, and uninterrupted user of the custom: *and then you should inquire whether any document, or memorial, of more ancient times, is produced, tending to disprove the existence of the custom at that early period to which the law looks back.*<sup>44</sup>

## Continuity

It must have been continued. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*; for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom. As if I have a right of way by custom over another's field, the custom is not destroyed, though I do not pass over it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.<sup>45</sup>

This is perhaps one of the more difficult of Blackstone's criteria to establish from the cases, particularly of Blackstone's time, because it does not appear to have arisen apart from immemoriality. Though Blackstone cites no cases in his *Commentaries* for this criterion, it was established at least a century and a half before he wrote them that continuity was a requirement in the 1608 *Tanistry Case*.<sup>46</sup> Nevertheless, it does appear that the continuity to which Blackstone refers, much like the law of easements, is one of *right* and not of *usage*. Certainly this is so by the 20th century.

Compelling is the 1865 case of *Gaved v. Martyn*,<sup>47</sup> one of several fascinating tin-mining cases. Here, tin miners had artificially brought water to the surface of certain lands for the purpose of streaming their tin. Plaintiff claimed the same water by prescription. The court held that whereas it was possible to obtain such a right by prescription, there was not a sufficient claim "of right" as the rights of the tin-miners were by custom of the county of Cornwall "and the miners had not permanently abandoned their right of control over the water in the stream when the plaintiff diverted it by the upper to launder his works."<sup>48</sup>

This matter of purposeful abandonment is particularly significant. Indeed, one of the more fascinating of the cases dealing with customary rights turns to a large extent on abandonment of a customary right—or the lack thereof. In the 1870 case of *Warrick v. Queens College, Oxford*,<sup>49</sup> freehold tenants of certain manors held by Queens College sued to restrain the college from enclosing certain nearby open space, leasing it to the government for artillery practice, and the building of buildings thereon. The basis of the suit for injunctive relief was the collection of common rights the plaintiffs claimed in the open space of that portion of the

36. 4 Burr 2303, 98 E.R. 201 (1769).

37. *Id.* at 2368.

38. *Id.* at 2417.

39. 2 Hy Bl 393 (1795); All E.R. 571 (1775-1802); 126 E.R. 614.

40. A portion of land, as a field, enclosed by a hedge, fence or other visible enclosure. WEBSTER'S NEW COLLEGIATE DICTIONARY 321 (1981).

41. 2 Hy Bl at 393; All E.R. at 571; 126 E.R. at 614.

42. *Id.* at 399; All E.R. at 574; 126 E.R. at 617.

43. 2 M & Rob 129 (1837); All E.R. 201 (1835-1842).

44. *Id.* at 136 (emphasis added).

45. 1 WILLIAM BLACKSTONE, COMMENTARIES \*77.

46. Davis 28, 80 E.R. 639 (1608).

47. 19 CB (NS) 732 (1865).

48. *Id.* at 757.

49. 10 L.R. Eq. 105 (1870).

manors (the three common areas being Shoulder of Mutton Green, Plumbstead Common, and Bostal Heath) particularly to pasture cattle *levant et couchant*,<sup>50</sup> feed geese and ducks, cut wood, hay and turf, and walk, drive, and ride upon the commons for exercise and recreation. While the court found substantial evidence that several commoners had by persuasion, threat, and other means ceased exercising their common rights and moreover that all the rights were not exercisable on all three of the commons, the court held that where the lord had attempted to stop the user of a common, the fact that some of the tenants had yielded to such attempts was not an interruption of the right within the meaning of certain statutes defining interruption. As a consequence, what customary rights remained, were sufficiently continuous to be upheld. Therefore the plaintiff commoners were entitled to their injunction. In closing, the court observed:

I regret much that the good understanding which seems to have prevailed between the college and the freehold tenants of the manor for centuries up to 1859 should ever have been disturbed, but the increased valued for building purposes of the soil in these suburban commons has of late years created much litigation, stirring up antiquated questions of black-letter law—unfortunately at a great expense to the parties concerned, and with little profit to anyone who is not a member of the legal profession.<sup>51</sup>

The relatively modern 1962 case of *Wyld v. Silver*<sup>52</sup> illustrates most conclusively the Blackstonian doctrine on this point: interruption of use does not equate with interruption of the right, which would end the custom. Based on custom, plaintiffs claimed a declaration that as inhabitants of a parish, they were entitled to hold an annual fair on a plot of land acquired by defendant, and that the defendant was not entitled to disturb the soil or erect any building on it, and ordering defendant to remove what buildings and structures he had erected. Holding that the plaintiffs had shown their rights still existed, the court granted the injunction against the defendants. To the claim that the rights had long-since been abandoned, Master of the Rolls Lord Denning held:

True it is that no fair or wake has been held there within living memory. But no matter. They have a right, they say, to hold it on this piece of land. . . . Needless to say, after so long a period of disuse, the inhabitants must establish their right with clearness and certainty, but I must say they have done it. . . . [Their proof] clearly show[s] the right of the inhabitants, and there is no reason to suppose they have lost it. I know of no way in which the inhabitants of a parish can lose a right of this kind once they have acquired it except by Act of Parliament. Mere disuse will not do. And I do not see how they can waive it or abandon it. No one or more of the inhabitants can waive or abandon it on behalf of the others. Nor can all the present inhabitants waive or abandon it on behalf of future generations. . . . In my judgment, therefore, the inhabitants of Wraysbury still have the right to hold a fair

or wake on this piece of land on the Friday in Whitsun week.<sup>53</sup>

Indeed, as the court above suggests, the issue of proof is often the most difficult in establishing continuity, as it once was in establishing immemorial usage. However, once the obstacle is overcome, courts have on occasion been quite generous in finding customary rights. Thus, in the 1840 case of *Scales v. Key*,<sup>54</sup> a custom found to exist in 1689 was held good even though it had not been exercised for 150 years. On the other hand, the court in *Hammerton v. Honey*<sup>55</sup> found a strong presumption against custom when an alleged custom is unexercised for many years, and that lack of use is acquiesced in by those alleged to be entitled to that exercise.

### Peacefulness

It must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their original to common consent, their being immemorially disputed either at law or otherwise is a proof that such consent was wanting.<sup>56</sup>

The criterion of peacefulness, like continuity, comes up less often than the other criteria in reported cases, and Blackstone cites none whatsoever in his discussion (though he does cite to *Coke on Littleton* as with virtually all of the criteria).<sup>57</sup> Indeed, the issue of peacefulness appears most often to arise in the negative. Thus, in the 1913 case of *Payne v. The Ecclesiastical Commissioners and Landon*,<sup>58</sup> tenants of a manor asserted a customary right to fish in a particular area or messuage.<sup>59</sup> After noting that the tenants had to establish, inter alia, that they had enjoyed the custom from time immemorial and that the usage was reasonable, the court referred to “the continual protest by the lord or the farmer when the tenants asserted the custom.”<sup>60</sup> The court held (“not without regret”) that the custom failed for want of immemoriality as well, apparently, as peacefulness.

On the other hand, the court, in the 1863 case of *Wake v. Hall*,<sup>61</sup> upheld mining customs (even though expanded to reflect modern machinery usage) in part because the “alleged ancient right, springs from unquestioned immemorial customs . . . [and] does not appear to have ever, before the present occasion, been the subject of controversy or litigation.”<sup>62</sup>

53. *Id.* at 255-56.

54. 11 Ad. & El. 819 (1840); 113 E.R. 625.

55. 24 W.R. 603 (1876).

56. 1 WILLIAM BLACKSTONE, COMMENTARIES \*77.

57. There is some variation in subsequent editions of the *Commentaries* in the footnotes to various parts of the discussion on custom, particularly with respect to the criteria. Thus, for example, the first edition appears to be no footnote j in the first edition, which appears in the text and notes to several of the subsequent editions (at least in second, fourth, fifth, seventh, and eighth) in the section on continuity. This and other minor variations in punctuation and capitalization do not appear to affect the substance of the text and references in any significant way. See original editions in the manuscripts collection of the Cambridge University Library, reviewed by the author March 1999.

58. 30 T.L.R. 167 (1913).

59. Defined as a dwelling house with adjacent buildings and ground. BLACK'S LAW DICTIONARY 990 (6th ed. 1990).

60. 30 T.L.R. at 168.

61. 8 L.R. A.C. 195 (1883).

62. *Id.* at 215.

50. Literally, rising and falling down; the term was applied to trespassing cattle which have remained long enough upon land to have lain down to rest and risen up to be fed. BLACK'S LAW DICTIONARY 906 (6th ed. 1990).

51. 10 L.R. Eq. at 129-30.

52. 1 Ch. 243 (1963).



Again, in *Warrick*<sup>63</sup> (mentioned in the previous section) the court, in noting the recent attempts to keep tenants from asserting their commoner rights, said, "[b]ut these are not sufficient to invalidate what appear to be the continued and *uncontested* rights of the freehold tenants . . . which, as I have said, I never find to have been contested until the year 1860."<sup>64</sup>

### Reasonableness

Customs must be reasonable; or rather, taken negatively, they must not be unreasonable. Which is always, as Sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of a law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus, a custom in a parish, that no man shall put his beasts into the common till the third of october, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits.<sup>65</sup>

The critical importance of reasonableness is best set out in *Arthur v. Bokenham*,<sup>66</sup> a dispute over an alleged custom permitting the devise of certain property acquired after the making of a will. With respect to reasonableness, the court set out the basis for sharply restricting custom, even more than acts of Parliament, because of its detrimental effect on common law:

[A]ll customs, which are against the common law of England, ought to be taken strictly, nay very strictly, even stricter than any Act of Parliament that alters the common law. It is a general rule, that customs are not to be enlarged beyond the usage; because it is the usage and practice that makes the law in such cases, and not the reason of the thing, for it cannot be said that a custom is founded on reason, though an unreasonable custom is void; for no reason, even the highest whatsoever, would make a custom or law; so it is no particular reason that makes any custom law, but the usage and practice itself, without regard had to any reason of such usage; and therefore you cannot enlarge such custom by any parity of reason, since reason has no part in the making of such custom. Now in the construction of Acts of Parliament it is otherwise, and there is a greater latitude allowed in them; and the reason that induced the law-makers to make such Acts to take away the common law, may be and is usually urged in making construction of them. There in doubtful cases we may enlarge the construction of Acts of Parliament according to the reason and sense of the law-makers expressed in other parts of the Act, or guessed, by considering the frame and design of the whole. But it is not so in the case of a custom, because not founded on any particular reason.<sup>67</sup>

Certainly, as both Coke and Blackstone suggest, reasonableness cannot depend solely on whether it appears reason-

able to the freeholder or owner whose land is burdened with the exercise of a customary right, say, of common or passage, to have such a burden on his land. Although there are cases which clearly hold too much interference with that land will make the alleged custom void for unreasonableness. Certainly, also, reasonableness means reasonable as a matter of law. But there are many variants in between.

The issue of reasonableness is not only one of the most common issues raised in cases dealing with custom,<sup>68</sup> but it is one of the earliest. Well before Blackstone wrote his commentaries, English courts were struggling with the concept and declaring customs bad as unreasonable. The earliest of these appears to be the 1401 yearbook case of *Miles v. Benet*,<sup>69</sup> which is almost certainly the source of Blackstone's example in his *Commentaries*. The alleged custom, that tenants should not put beasts into the common before the lord of the manor, was held void because the lord might not put in his beasts at all and thereby bar the commoners' rights for all time. This helped establish the principle that a custom that subjects a multitude to the whim of an individual is bad as unreasonable.<sup>70</sup>

Coke had quite a lot to say about reasonableness as a criterion for good custom, for which Blackstone cited him. Coke established that reasonableness of custom is a question of law, for the court, and not a question of fact, for a jury, in the 1612 case of *Rowles v. Mason*.<sup>71</sup> There, the custom alleged was that a copyhold tenant may cut down all the trees on his land and sell them. After distinguishing custom from prescriptive rights, Coke declared the custom "against common reason, incongruent and against common law, that a copy-holder for life may cut and sell the trees and custom ought to have reason and congruence."<sup>72</sup> There follow several examples of customs which would be bad because contrary to the law of estates as, for example, turbary<sup>73</sup> attached to land rather than to a house.

In the 1698 case of *Weekly v. Wildman*,<sup>74</sup> the custom of all inhabitants of a town to have common for all commonable cattle was held unreasonable and so bad, because there was no limit to the number of cattle that could be turned loose on the land in question and the plaintiff had not given any reason why such a surcharge of the common would be good. The case came up in an interesting fashion. Defendant "had erected an engine by which he cast the water upon the said fen, more than could be carried off by the drains of the said fen, whereby the said fen was drowned, so that the plaintiff could not enjoy his common in so full and beneficial a manner as he ought."<sup>75</sup>

Although the older cases discussed above often dealt with such as tolls, inheritance, and criminal procedures, under this criterion the courts come to grips most often with the adverse effect on private property which the exercise of customary rights will likely have. This is particularly true of the

68. Occurring in nearly two-thirds of the roughly 200 cases of record reviewed by the author.

69. Y.B. Trin. 2 Hen., 4 f.24, pl.20 (1401).

70. See 12 (1) HALSBURY'S LAWS OF ENGLAND (1998).

71. 2 Brown 192, 123 E.R. 829, 892 (1611).

72. *Id.* at 199-200, 123 E.R. at 895.

73. The right or liberty of digging up turf on another's ground. BLACK'S LAW DICTIONARY 1516 (6th ed. 1990).

74. 1 Ld. Raym 405, 91 E.R. 1169 (1698).

75. *Id.*

63. 10 L.R. Eq. 105 (1870).

64. *Id.* at 127 (emphasis added).

65. 1 WILLIAM BLACKSTONE, COMMENTARIES \*77.

66. 11 Mod 148, 6 Queen Anne.

67. *Id.* at 160-62 (emphasis added).

cases that arose during Blackstone's time (the middle of the 18th century), which presumably he had in mind when writing the *Commentaries*, and shortly thereafter, often reflecting his conclusions in the *Commentaries*. Although turning as much on the issue of certainty (discussed in the next section), the 1742 mining case of *Broadbent v. Wilkes*<sup>76</sup> is an excellent example of a Blackstone-era case in which the court could not stomach the unreasonableness of the custom. The custom alleged:

[W]here the customary tenant of a manor has coal mines lying under the freehold lands of other customary tenants, within and parcel of the manor, he may sink pits in those lands to get the coals &c., may lay the coals when got and the earth and rubbish &c. on the land near to such pits, such lands being customary tenements and parcel of the manor, there to remain and continue (not saying how long, or for a convenient time), may lay and continue wood there for the necessary use of the pits, may take away carts and wagons part (not saying how much) of the coals, and burn and make into cinders the other parts there at his will and pleasure.<sup>77</sup>

The court declared this to be an unreasonable and void custom:

And certainly no custom can be more unreasonable than the present. It may deprive the tenant of the whole profits of the land; for the lord or his tenants may dig coal-pits when and as often as they please, and may in such case lay their coals &c. on any part of the tenant's land, if near to such coal-pits, at what time of the year they please, and may let them like there as long as they please . . . So that they may be laid on the tenant's land and continue there forever . . . which is absurd and unreasonable. The objection that this custom is only beneficial to the lord and greatly prejudicial to the tenants is, we think, of no weight, for it might have a reasonable commencement notwithstanding, for the lord might take less for the land on the account of this disadvantage to his tenant. But the true objections to this custom are, that it is uncertain and likewise unreasonable, as it may deprive the tenant of the whole benefit of the land, and it cannot be presumed that the tenant at first would come into such an agreement.<sup>78</sup>

The decisions were sustained in 1745 in *Wilkes v. Broadbent*,<sup>79</sup> with particular emphasis on the great burden on private land without any noticeable public or private consideration.

The burdening of private lands with custom continued to be a fertile ground for litigation shortly after the last editions of Blackstone were published. In the 1818 case of *R v. Inhabitants of Ecclesfield*,<sup>80</sup> the alleged custom was for parishioners to repair a road in another parish. Citing both Blackstone and Coke, Lord Ellenborough held the custom to be unreasonable in part because "[t]here cannot be a custom in one place to do something in another. The land in a particular place, and the inhabitants in respect thereof, may be charged by custom, for matters within the place; but custom will not apply to matters out of it."<sup>81</sup>

The rest of the cases dealing with reasonableness—and they number in the dozens—defy easy categorization. One of the most common reasons for declaring a custom unreasonable—and these outnumber the reasonable cases by a fair margin—is that the custom has an unusually burdensome effect on the land over or on which it is exercised. Several such cases are discussed above, such as *Broadbent* in Blackstone's day. This is not an isolated case, nor an isolated concern. In the 1837 case of *Bastard*,<sup>82</sup> discussed earlier under immemoriality, Justice Tindal instructed the jury as follows with respect to the Devonshire custom for tin miners to direct water into their mines:

[T]ouching the unreasonableness of the custom, though you are not called on to say whether this be a reasonable custom or not (for that is a matter of law, not submitted by the present pleadings to your decision), still you may properly thus far look to the nature of the custom that, if you find it greatly affecting the rights of private property, you may fairly expect and require that it should be supported by evidence proportionably strong and convincing. You are not to come to the conclusion that inhabitants of a large district, like that over which the supposed custom extends, surrendered their rights over their own soil, *unless you find repeated acts of exercise of the custom on the one hand, and of acquiescence on the other*.<sup>83</sup>

The early 20th century cases of *Mercer v. Denne*,<sup>84</sup> upholding custom of the inhabitants of a parish (fishermen) to use a piece of land covered with shingle to spread and dry their nets as in favor of navigation, permitted the exercise of the custom to change with the times so long as the burden on the landowner was not unreasonable:

The tanning, cutting or oiling of nets [new] belonging to fishermen tend to preserve the nets and make them useful for a longer period, and the subsequent drying of nets seems to me to fall within the reasons thus assigned for the custom. It is laid down by Holt, J. in *City of London v. Vanacacre*<sup>85</sup> [a late 17th century case] that "general customs may be extended to new things which are within the reason of those customs." There is not, in my opinion, evidence from which it ought to be inferred that the practice of tanning or cutting has arisen within the time of legal memory. But it was said that, so far as related to the drying after oiling, the use has extended over a period of from twenty-five to thirty-five years only, and, moreover, that this user was more burdensome than the old user for drying after tanning or cutting. I think, however, that the law as laid down by Lord St. Leonards in *Dyce v. Hay* cited by Farwell J., applies, and that those who are entitled to the benefit of a custom ought not to be deprived of that benefit simply because they take advantage of modern inventions or new operations *so long as they do not thereby throw an unreasonable burden on the landowner*.<sup>86</sup>

Again, "[i]t must not be forgotten that the persons claiming under the custom are bound to exercise their rights reasonably and with due regard to the interest of the owner of the soil."<sup>87</sup> According to Judge Falwell in the court below

76. Willes 360, 125 E.R. 1214 (1742).

77. *Id.*

78. *Id.* at 363, 125 E.R. at 1216.

79. 2 Stra 1224; 1 Wils 63; 93 E.R. 1146 (1745).

80. 1 B & Ald 348, 106 E.R. 128 (1818).

81. *Id.* at 360, 106 E.R. at 133 (citing *Gateward's Case*, 6 Co. Rep. 596, 77 E.R. 344 (1607)).

82. 2 M & Rob 126 (1837); [1835-42] All E.R. 201.

83. *Id.* at 203 (emphasis added).

84. 2 Ch. 534 (1904); 2 Ch. 538 (C.A.) (1905).

85. 12 Mod 270, 271 (1699).

86. 2 Ch. 538, 581 (1905) (emphasis added).

87. *Id.* at 584 (1905).



(1904), reasonableness is determined at the inception of a custom and it is no objection that it may at times have been used in an unreasonable manner.<sup>88</sup> His opinion represents an early 20th century view of the limitations and requirements of custom.<sup>89</sup>

Perhaps there is no better example of language requiring the protection of underlying property rights than the 1847 case of *Rogers v. Brenton*.<sup>90</sup> Cornish tin miners claimed by custom to be able to renew their claims by renewing boundary posts, without actually working the tin mine. Although the court appeared to hold the renewal unreasonable without actual working of the mine, Lord Denman held tin bounding generally reasonable, only because there was a benefit to the public:

Customs, *especially where they derogate from the general rights of property*, must be construed strictly; and above all things they must be reasonable. Bounding is a direct interference with the common law rights of property. It takes from the owner of land, who is unable or unwilling at a particular moment to dig for tin under his waste land, the right to do so, it may be forever, and vests it in a stranger, making only a customary render in return: it empowers the stranger not only to extract the mineral from beneath the surface but to enter on the surface and cumber it with the machinery, buildings and refuse stuff which the operations below occasion; and all this without the least regard to the convenience or interests of the owner. *The only things which make this reasonable are the render of the toll tin to the owner and the benefit to the public secured thereby in the extraction of the mineral from the bowels of the earth.* Both of these are not only lost, but the latter, it may be, positively prevented, if the boulder may decline to work, and yet retain the right to exclude the owner.<sup>91</sup>

"Contrary to natural justice" was the rationale of the court in striking down as unreasonable several customs. For example, the court found certain court processes to be contrary to the principles of natural justice, in the 1867 case of *London Corpn. v. Cox*.<sup>92</sup> Citing and quoting copiously from older opinions, the court noted repeatedly the unreasonableness of the custom.

A twist on unreasonableness comes in the unreasonable exercise of a lawful custom in the 1797 case of *Fitch v. Fitch*.<sup>93</sup> There, the custom was for all the inhabitants of the parish of Steeple Bumstead to play at all times of the year lawful games and pastimes on a certain close. While the court upheld the custom in a suit for trespass by some of the inhabitants, the court made an excellent statement about the reciprocal rights of the parties.

The custom appears to be established. The inhabitants had a right to take their amusement in a lawful way. It is supposed, that because they have such a right, the plaintiff should not allow the grass to grow. There is no foundation in law for such a position. The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly to exercise the

right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded, which is a right to come to the close to use it in the exercise of any lawful games or pastimes, and are thereby trespassers. His Lordship therefore left it to the jury to say, whether the defendant had entered the close in the fair exercise of a right, or in an improper way.<sup>94</sup>

As the inhabitants had trampled on fresh-mown hay, threw it about and mixed gravel with it, the court found they had acted in an unlawful way—an unreasonable exercise of a lawful custom.

The court came to a different conclusion in the 1867 case of *Sowerby v. Coleman*.<sup>95</sup> The alleged custom was for inhabitants of a parish to exercise and train horses at all seasonable times of the year, in a place beyond the limits of the parish. Aside from the problem of extra-parish customs discussed in the following section, it was argued:

Secondly, this custom is unreasonable. It amounts to a claim of a profit a prendre, or is at least within the reason on which such a custom is disallowed, for it excludes the owner of the soil from any beneficial use of it, and that without compensation.<sup>96</sup>

The court agreed:

Here all the inhabitants of the parish claim the right to go into the land of another person, and to use it for the purpose of exercising and training horses, at all "seasonable times" of the year. . . . Such a right, then, to exercise an indefinite number of horses, for an indefinite period of the year, would exclude the owner from the beneficial occupation of his property during probably the whole year.<sup>97</sup>

As the next section indicates, there is of course a measure of uncertainty which leads to unreasonableness, and the two are often related. This theme is the basis of the holding of unreasonableness in the modern 1964 case of *Fowley Marine Ltd. v. Gafford*.<sup>98</sup> There, a supposed custom for the world at large to moor boats was held to be too broad as well as unproven. To this issue of breadth and certainty (or lack thereof) we now turn.

## Certainty

Customs ought to be *certain*. A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. A custom, to pay two pence an acre in lieu of tithes, is good; but to pay sometimes two pence and sometimes three pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a years improved value for a fine on a copyhold estate, is good: though the value is a thing uncertain. For the value may at any time be ascertained; and the maxim of the law is, *id certum est, quod certum reddi potest*.<sup>99</sup>

88. *Id.* at 557 (1904).

89. *Id.* at 551 (1904).

90. 10 Q.B. 25 (1847).

91. *Id.* at 58 (emphasis added) (goes on for another 20-30 lines in this vein).

92. L.R. 2 H.L. 239 (1867).

93. 2 Esp 543 (1797).

94. *Id.* at 544-45.

95. L.R. 2 Ex. 96 (1867).

96. *Id.* at 97 (citing *Gateward's Case*, 6 Co. Rep. 596, 77 E.R. 344 (1607)).

97. *Id.* at 99-100.

98. 2 Q.B. 808 (1967), 2 All E.R. 472 (1967).

99. 1 WILLIAM BLACKSTONE, COMMENTARIES \*78.

The matter of certainty is one of the most easily ascertainable of the seven criteria in Blackstone's *Commentaries*. As appears below, it is also the one about which courts before, during and after Blackstone's time have been the clearest. It is also the criterion most obviously ignored by American courts dealing with custom, even when citing Blackstone, as they often do. This is particularly true with respect to two of the most common aspects of certainty: geographic area (usually small and well-defined) and population (also usually small and well-defined). The third area in which the criterion of certainty becomes a major factor is in the definition of the practice itself, which is allegedly customary in nature.

### Certainty of Practice

Such was clearly the case in Blackstone's time. Thus, in the 1745 case of *Wilkes*,<sup>100</sup> the custom was for the lord of the manor or his tenants, when mining coal, "time out of mind to throw the earth, stones, coals &c. coming therefore together in heaps upon the land *near* such pits. . . ."<sup>101</sup> Not only did this totally deprive the other tenants of the value of their land, but "there being no restriction in time, [and] the word *near* was too vague and uncertain."<sup>102</sup> The opinion of the lower court<sup>103</sup> explains the nature of the uncertainty:

If every uncertain custom be void, this cannot be good, for nothing can be more uncertain. The word "*near*" is not intelligible: but, to make it certain and intelligible, it should be "*nearest*" or "*adjoining*." Supposing many lands and of different persons lay within a small distance, some ten yards off, and some twenty &c; which of these lands must be said to be *near* within the meaning of this custom? The custom, that is laid, is to take away and carry away part of the coals placed there, and to burn and make into cinders the other parts thereof, not saying what part, nor how long it is to lie there. So in this respect the custom is likewise quite uncertain.<sup>104</sup>

Again, in the 1746 case of *Millechamp v. Johnson*,<sup>105</sup> an alleged custom for the inhabitants of a parish to play games on plaintiff's close was held bad for uncertainty: to play "any" rural games. Also in the 1788 case of *Steel v. Houghton*,<sup>106</sup> concerning a custom for the poor and indigent in a parish to glean,<sup>107</sup> although the principle problem was one of the indefiniteness of the class to which the custom applied (a factor of certainty addressed later in this section), the court also found that:

Such a custom as will support the plea, must be universal, and everywhere the same, otherwise it is void for its uncertainty. If it exists only in particular counties or districts (such as the custom of being discharged from the payment of tithes of wood in some hundreds in the wilds of Kent and Sussex, or the custom of gavelkind), it is par-

tial, and no part of the general customs of the realm. From the best inquiries I have been able to make, I find that this custom is not universal. In some counties it is exercised as a general right, in others, it prevails only in common fields, and not in inclosures, in others it is precarious, and at the will of the occupier. In the county where this action was brought, it never in practice extended to barley; nor is the time ascertained. In some counties the poor glean whilst the corn is on the ground; here the usage is laid to be after the crop is harvested.<sup>108</sup>

Again, "[t]he practice also of gleaning is itself uncertain and changeable. In some counties it is entirely excluded, in others partially admitted, and in others modified with every possible variety."<sup>109</sup>

In the 1806 case of *Lady Wilson v. Willes*,<sup>110</sup> the alleged custom was that all the customary tenants of the manor having gardens have immemorially taken away, dug and carried away from the waste within the manor for the purpose of making and repairing grass-plots in the garden such turf covered with grass fit for the pasture of cattle, at all times of the year as often and in such quantity as the occasion required. Lord Ellenborough held:

[A] custom, however ancient, must not be indefinite and uncertain: and here it is not defined what sort of improvement the custom extends to: it is not stated to be in the way of agriculture or horticulture: it may mean all sorts of fanciful improvements: every part of the garden may be converted into grass-plots, and even mounds of earth raised and covered with turf from the common: there is nothing to restrain the tenants from taking the whole of the turbary of the custom and destroying the pasture altogether. A custom of this description ought to have some limit, but here is no limitation as laid, but caprice and fancy. Then this privilege is claimed to be exercised when occasion requires. What description can be more loose than that? It is not even confined to the occasions of the garden. It resolves itself, therefore, into the mere will and pleasure of the tenant, which is inconsistent with the rights of all the other commoners as well as of the lord. The third special plea is also vastly too indefinite: it goes to establish a right to take as much of the turf of the common as any tenant pleases for making banks and mounds on his estate: it is not even confined to purposes of agriculture. All the customs laid therefore are bad, as being too indefinite and uncertain.<sup>111</sup>

The trend of the law continued in this vein into the 19th and 20th centuries. In the 1835 case of *Bluwett v. Tregonning*,<sup>112</sup> it was held uncertain and so bad for all the inhabitants of a parish to enter a particular close at all reasonable times of the year to collect and carry away reasonable quantities of sand drifted onto the land by the sea. Indeed, one justice declared:

The custom alleged is uncertain, indefinite and absurd. In point of fact there can be no rule for ascertaining, in a case like this, what is sand blown from the sea-shore and what is the original soil. And, in law, I do not see how there could be any such custom as this.<sup>113</sup>

100. 2 Stra 1224, 93 E.R. 1146 (1745).

101. *Id.* (emphasis added).

102. *Id.* at 1225.

103. *Broadbent v. Wilkes*, Willes 360, 125 E.R. 1214 (1742).

104. *Id.* at 362.

105. (1746) Willes 205n(b).

106. 1 Hy B1 51, 126 E.R. 32 (1788).

107. To gather grain or other produce left by reapers. WEBSTER'S NEW COLLEGIATE DICTIONARY 484 (1981).

108. 1 Hy B1 at 60.

109. *Id.* at 62.

110. 7 East 121 (1806).

111. *Id.* at 128.

112. 3 Ad. & El. 554, 111 E.R. 524 (1835).

113. *Id.* at 575-76.

## Certainty of Locale

To be good, a custom needs to be confined to a particular place or locale, like a county, a parish or a village.<sup>114</sup> Otherwise, it approaches the general application and usage which is the hallmark of the common-law principle, to which a custom is usually opposed. This was true during and after Blackstone's time, and well before. In the 1599 case of *Parker v. Combleford*,<sup>115</sup> the court declared a custom for the lord of the manor to take as heriot<sup>116</sup> the best beast of any person dying within the manor bad in part because the custom was thus extended to those living outside the geographical area of the manor: "[i]f this be a general custom which goes to the whole county [presumably the court means common law as Blackstone would describe general custom in his *Commentaries* a century and a half later] it might be intended, and peradventure would be maintainable; but not as a private custom within the manor [meaning presumably particular custom]."<sup>117</sup>

Perhaps no stronger statement can be found than in the earlier mentioned case of *Arthur*,<sup>118</sup> dealing with a custom allegedly permitting after-acquired property to pass by devise after the making of a will. The court began by declaring why customs are to be strictly construed:

[B]ecause all customs which are against the common law of England, ought to be taken strictly, nay very strictly, even stricter than any Act of Parliament that alters the common law. It is a general rule, that customs are not to be enlarged beyond the usage; because it is the usage and practice that makes the law in such cases, and not the reason of the thing, for it cannot be said that a custom is founded on reason, though an unreasonable custom is void; for no reason, even the highest whatsoever, would make a custom law; so it is no particular reason that makes any custom law, but the usage and practice itself, without regard had to any reason of such usage, and therefore you cannot enlarge such custom by any parity of reason, since reason has no part in the making of such custom.<sup>119</sup>

The court then continued:

[T]he law allows usage in particular places to supersede the common law, and is the local law, which is never to be extended further than the usage and practice, which is the only thing that makes it law.<sup>120</sup>

In the 1803 case of *Legh v. Hewitt*,<sup>121</sup> the defendant allegedly breached a duty to occupy a farm in a good and husband-like manner according to the custom of the country, by tilling half his farm at once, when no other farmer there tilled more than a third and many tilled only a fourth. The court refused to find such a custom because of the lack of a particular locale:

[I]t is evident that the word custom, as here used, cannot mean a custom in the strict legal signification of the

word; for that must be taken with reference to some defined limit or space which is essential to every custom properly so called. But no particular place is here assigned to it; nor is it capable here of being so applied.<sup>122</sup>

A few years later, in the 1828 case of *Gifford v. Lord Yarborough*,<sup>123</sup> the House of Lords found land formed by alluvion of the sea, imperceptibly, belongs to the owner of the adjoining demesne lands, and not to the crown, but not because of a particular custom. Its rationale is instructive, particularly given the reasoning of the American court in Oregon in *Stevens v. City of Cannon Beach*<sup>124</sup> that a customary right can extend to all the dry sand area land on the coast of Oregon:

If there is custom regulating the right of the owners of all lands bordering on the sea, it is so general a custom as need not be set out in the pleadings, or proved by evidence, but will be taken notice of by the Judges as part of the common law.<sup>125</sup>

To the same effect was the 1913 case of *Anglo-Hellenic Steamship Co. v. Louis Dreyfus & Co.*,<sup>126</sup> in which the question of charterers' liability for demurrage while a ship was waiting to load, which turned on whether the common law of England or port custom prevailed. In the course of its opinion, the court defined custom with respect to place:

A custom is a reasonable and universal rule of action in a locality, followed, not because it is believed to be the general law of the land or because the parties following it have made particular agreements to observe it, but because it "is in effect the common law within that place to which it extends, although contrary to the general law of the realm."<sup>127</sup>

Therefore, and perhaps obviously, to avail oneself of a customary right, one must both live in the district in which the custom is alleged, and practice the customary right in that same district.

The 1907 case of *Lord Fitzhardinge v. Purcell*<sup>128</sup> exemplifies these principles. In a typical action for trespass, the lord of certain manors brought the action against defendants who claimed customary rights to the foreshore and waters of a certain waterway for the purpose of hunting wildfowl. The court disallowed the defense:

But whether or not the custom alleged be good law, I am of the opinion that the evidence in the present case is far short of what is required to prove any custom at all. The only evidence of any exercise of the alleged right by persons being wild-fowlers by trade is the evidence of an exercise of the right by the defendant and his father. . . . It is not proved that any of these, with the exception of the defendant and his father, for some short period, lived in any part of the local area in which the alleged custom is said to prevail. It is proved that in exercising the alleged

114. See 12 (1) HALSBURY'S LAWS OF ENGLAND (1998).

115. Cro. Eliz. 725, 78 E.R. 959 (1599).

116. A customary tribute of goods and chattels payable to the lord at death. WEBSTER'S NEW COLLEGIATE DICTIONARY 859 (1981).

117. Cro. Eliz. at 726.

118. 11 Mod 148, 6 Queen Anne.

119. *Id.* at 160-61.

120. *Id.* at 161.

121. 4 East 154, 102 E.R. 789 (1803).

122. *Id.* at 159. The court ordered a new trial, however, because it found evidence of bad farming which did not depend on custom, and a properly instructed jury might have found against the defendant.

123. 5 Bing 163, 130 E.R. 1028 (1828).

124. 854 P.2d 449, 24 ELR 20913 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994).

125. 5 Bing at 165 (emphasis added).

126. 108 L.T.R. 36 (1903).

127. *Id.* at 37 (citing the case of *Lockwood v. Wood*, 6 Q.B. 50 (1844)) (emphasis added).

128. 2 Ch. D. 139 (1908).

right none of them confined himself to shooting on the lands in question. . . . [T]he user proved, therefore, is more extensive than the custom alleged, and would only be partially explained by the custom if upheld.<sup>129</sup>

### Certainty of Persons

The requirement that there be certainty of persons was as important as certainty of place in order for a custom to be good. This principle was well-established in the time of Blackstone. This is evident from the 1788 case of *Selby v. Robinson*<sup>130</sup> in which there was an alleged "custom for poor and indigent householders living in A to cut away rotten boughs and branches in a chase of A."<sup>131</sup> Holding the defendants to be therefore trespassers for breaking and entering plaintiff's closes, the court said:

[T]here is no limitation at all in this case; and it is impossible to ascertain who is entitled to this right under the custom as stated in the record; for the description of poor householders is too vague and uncertain.<sup>132</sup>

Again in 1788, in *Steel*,<sup>133</sup> the court struck down an alleged custom of gleaning on the ground that "the poor" was too uncertain and indefinite a class to exercise it:

Next, the persons claiming this right, are vague and undefined. The term poor is merely relative. Before the statute of the 43rd of Eliz. there was no method of legally ascertaining who were of that description. Since that statute, justices and overseers are to determine what persons are of the number of the poor, to whom also must be added the qualifications of a settlement. . . . They who claim this right then, are equally uncertain and precarious.<sup>134</sup>

The court was even more definite in the 1795 case of *Fitch*,<sup>135</sup> where the custom was for all the inhabitants of a parish to play at all kinds of lawful games at a particular close at all seasonable times of the year, including all persons for the time being in the same parish. As to the second part, the court said:

But I hold the other custom to be as clearly bad, as the first is good. How that which may be claimed by all the inhabitants of England can be the subject of a custom, I cannot conceive. Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind, can never be a custom.<sup>136</sup>

Again, 40 years later in the 1828 case of *Gifford*,<sup>137</sup> in holding that lands formed by accretion belonged to the owner of lands adjoining the sea, the court noted:

These are called special customs because they only apply to particular descriptions of persons, and do not affect all the subjects of the realm; but if they govern all persons belonging to the classes to which they relate, they are to be considered as public laws; . . . If there is a

custom regulating the right of the owners of all lands bordering on the sea, it is so general a custom as need not be set out in the pleadings, or proved by evidence, but will be taken notice of by the Judges as part of the common law.<sup>138</sup>

Litigation over footpaths was a fruitful source of custom allegations in the 18th and 19th century. Thus, in the 1852 case of *Dyce v. Lady James Hay*,<sup>139</sup> a magistrate of Old Aberdeen brought an action against Lady James Hay alleging that he and other inhabitants of New Aberdeen, Old Aberdeen, the vicinity thereof,

and the public generally, had used and enjoyed from time immemorial a certain footpath running along the bank of the River Don, on the Defender's Estate [and that a particular strip] had been from time immemorial used and resorted to by the Purser and the other inhabitants of the places aforesaid "for the purpose of recreation and taking air and exercise by walking over and through the same, and resting thereon as they saw proper."<sup>140</sup>

While the court was quite willing to accept a custom for the use of unenclosed land for village sports and recreations,<sup>141</sup> it found the class too broad to sustain here:

What is insisted upon, therefore, is of this extensive nature, that the Pursuer claims as an inhabitant, but, in fact, on behalf of all the Queen's subjects, the right to go at all times upon the inclosed soil of a portion of the Appellant's property near the mansion-house, for the purpose of recreation just as they think proper. Now, that, I conceive is a claim so large as to be entirely inconsistent with the right of property; for no man can be considered to have a right of property, worth holding, in a soil over which the whole world has the privilege to walk and disport itself at pleasure.<sup>142</sup>

Perhaps more directly on this point is the 1894 case of *Lancashire v. Hunt*,<sup>143</sup> in which an alleged custom to train unlimited numbers of race horses on the manorial common was held bad:

[T]he custom, so far as regarding training, was too wide, purporting as it did to show an exercise of an alleged right not limited to the inhabitants [of Stockbridge] at all, but quite as much for strangers and their horses as the in-

138. *Id.* at 164, 130 E.R. at 1023-24 (emphasis added). See also *Mounsey v. Ismay*, 1 H&C 729 (1863), where a custom for all the freeman of the city of Carlisle to enter a close for the purpose of racing horses was raised as a defense against an action for trespass for entering the close, breaking down gates and fences, and clearing mounds and thorns placed there by the owner. The court nevertheless held for the plaintiff landowner on other grounds (custom was a bad plea for an action brought as a claim to an easement under the Prescription Act). Also in *Grant v. Kearney*, 12 Price 773 (1823), the court refused to recognize a custom of perambulation of inhabitants of a particular liberty to pass through the gardens of Lincoln's Inn, on the ground that they had failed to prove the custom applied to the liberty and had proved only such a custom with respect to a parish, the boundaries of which were not shown to be coterminous with the liberty. We can perhaps derive two lessons here: (1) the courts will often at this time make a great deal of the niceties of pleadings (see CHARLES DICKENS, *BLEAK HOUSE* (1853), and the notorious fictional case of *Jarndyce v. Jarndyce*) particularly where property rights are involved, and (2) it does not pay to mess with the barristers of Lincoln's Inn.

139. 1 Macqueen 305, 19 Digest (Repl.) 15 (1852).

140. *Id.* at 305, 19 Digest (Repl.) at 300.

141. *Id.* at 311, 19 Digest (Repl.) at 302.

142. *Id.* at 309, 19 Digest (Repl.) at 301.

143. 10 T.L.R. 448 (1894).

129. *Id.* at 164.

130. 2 Term Rep. 758.

131. *Id.* at 758.

132. *Id.* at 759.

133. 1 H Bl 51.

134. *Id.* at 62.

135. (1795) [1775-1892] All E.R. 571.

136. *Id.* at 574.

137. 5 Bing 163, 130 E.R. 1023 (1828).

habitants, which did not prove the custom alleged, but a different custom, which would be bad in law.<sup>144</sup>

### Compulsory

Customs, though established by consent, must be (when established) *compulsory*; and not left to the option of every man, whether he will use them or not. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd; and, indeed, no custom at all.<sup>145</sup>

The concept that a custom must be compulsory in order to be good is for the most part self-evident; a law is not a law if it is not obligatory on the parties. Most of the cases on custom assume that a custom is compulsory, so that the issue is rarely addressed separately.

There are nevertheless a few cases that deal with the compulsory nature of a covenant as Blackstone describes it. In the 1690 case of *Pain v. Patrick*,<sup>146</sup> the alleged custom was the upkeep of a right of way involving a bridge:

But as to the plea in bar, it is not good, because the erecting of a bridge is but laying out a way; it is a voluntary act, and no man by reason of his own act can be discharged of what he is to do, upon the interest he hath in the ferry.<sup>147</sup>

Later in the 1913 case of *Anglo-Hellenic Steamship Co.*,<sup>148</sup> the demurrage case noted in a previous section, the court emphasized the binding nature of custom by comparing it to local common law:

A custom is a reasonable and universal rule of action in a locality, followed, not because it is believed to be the general law of the land or because the parties following it have made particular agreements to observe it, but because it "is in effect the common law within that place to which it extends."<sup>149</sup>

### Consistency

Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom.<sup>150</sup>

As with compulsory, the criterion of consistency is largely self-evident and does not appear often in the cases on customary law. Of course, to agree with Blackstone that customs must be consistent, one with another, does not get us very far in deciding which customary right is entitled to precedence in the event of conflict.

One of the earlier disputes in which the issue of consistency arose appears to have been decided largely on the ground of which custom was the more reasonable. In the 1561 case of *Parton v. Mason*,<sup>151</sup> the court was faced with two conflicting customs in resolving a dispute over the seizure of an ox. According to the first custom:

[T]he lord of the manor . . . was accustomed to have the best beast of every tenant dying seised of any messuage holden of the said manor upon that messuage after his death.<sup>152</sup>

But:

[T]here is another custom within the said manor, that if the best beast of the said tenant be cloigned before the seizure of it by the lord or his servant, that then the lord hath been accustomed to seize and take the best beast of any other being *levant et couchant* upon the said tenure.<sup>153</sup>

The court held that the second custom "seems to be repugnant to the first custom, and is a several custom by itself."<sup>154</sup> It was also adjudged to be "void and unreasonable."<sup>155</sup>

Shortly after Blackstone wrote his commentaries, the multiple disputes arose over the use of the close at Steeple Bumstead in Essex. In the 1795 case of *Fitch*,<sup>156</sup> the customs alleged were "for 'all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in the close of A. at all seasonable times of the year at their free will and pleasure[.]'"<sup>157</sup> and "for all persons for the time being, being in the parish"<sup>158</sup> to do the same. Defendants were charged with trespass for playing cricket on the close belonging to plaintiff. One of the objections made was "that the customs, whether good or bad, are repugnant to each other, and, therefore, that the court cannot give judgment on either of the special pleas."<sup>159</sup> The court disagreed:

It would be very strange if one Defendant should plead a good plea, and it were found for him, that he should not have judgment, according to the justice and truth of the case, though the other Defendant should plead a bad plea. But why are these customs inconsistent with each other? It might happen, that there might be at first a limited custom and afterwards a more extensive one, and I do not see why the second should root up the first, or why they might not both exist together, supposing the second to be a good one.<sup>160</sup>

As it turned out, as noted in an earlier section, the second was held bad as extending to too broad a class of persons.

In the 1818 case of *Badger v. Ford*,<sup>161</sup> the conflict was between "a custom for the lord to grant leases of the waste of the manor, without restriction"<sup>162</sup> and "by custom of the manor, all such tenements had a right of common."<sup>163</sup> When

151. Dyer 199, 73 E.R. 440 (1561).

152. *Id.*

153. *Id.*

154. *Id.* at 199-200, 73 E.R. at 441.

155. *Id.* at 200, 73 E.R. at 441.

156. (1795) 2 H Bl 394; [1775-1802] All E.R. 571; 126 E.R. 614.

157. *Id.* at 394; All E.R. at 571; 126 E.R. at 614.

158. *Id.*

159. *Id.* at 397; All E.R. at 573; 126 E.R. at 616.

160. *Id.* at 397-98; All E.R. at 573; 126 E.R. at 616.

161. 3 B & Ald 153, 106 E.R. 618 (1819).

162. *Id.* at 153.

163. *Id.* at 155.

144. *Id.* at 448.

145. 1 WILLIAM BLACKSTONE, COMMENTARIES \*78 (emphasis added).

146. 3 Mod Rep. 289, 87 E.R. 191 (1690).

147. *Id.* at 294, 87 E.R. at 194.

148. 108 L.T.R. 36 (1913).

149. *Id.* at 37 (emphasis added).

150. 1 WILLIAM BLACKSTONE, COMMENTARIES \*78 (emphasis added).

leases exercised under the first custom conflicted with the rights of commoners under the second, the court found the first "bad in point of law."<sup>164</sup> On the other hand, in the 1844 case of *Elwood v. Bullock*,<sup>165</sup> the court found customary rights to hold a fair consistent with customary rights to erect a booth on the highway during such a fair, provided there was still room for horses and carts to pass thereon.

These, then, are Blackstone's seven criteria for "good" customs, as interpreted by both contemporaries and later courts in England. Since customary rights in land are in derogation of common-law rights in land—particularly the fundamental right to exclude others—it makes sense for such customary rights to be limited in their exercise. Blackstone's criteria present such reasonable limitations. Moreover, as appears earlier and later in this Article, most courts cite Blackstone as authority for their customary law. It is not altogether apparent that they understand it, however.

### *Custom Exhumed: Oregon and Hawaii Rewrite the Law*

Courts have generally upheld state legislation purporting simply to restate existing customary public rights to use the beaches of the state regardless of private "ownership." In Texas, the courts so held, including limited access potentially through custom in *Moody v. White*<sup>166</sup> and *Arrington v. Mattox*.<sup>167</sup> However, nothing prepared the property world for what the courts in Oregon and Hawaii did to and with the law of custom a few years later. Oregon courts "found" a customary right without any fact-finding and extended it to the entire Oregon coast on behalf of the public at large. Hawaii, by comparison, ignored much of its own precedent on the rights of native Hawaiians and extended undetermined rights of access, worship, and gathering over the lands of the entire state, public or private, developed or undeveloped. The following sections, in turn, deal with each state's leap into the customary unknown.

### *Oregon*

The cases that changed the law in Oregon were decided against a backdrop of legislation which declared that any easement which the public had in or on the beach was vested in the state.<sup>168</sup> Based largely on theories of prescriptive rights, the state in *Oregon ex rel. Thornton v. Hay*<sup>169</sup> sought to prevent the landowners, the Hays, from constructing improvements on the dry-sand beach portion of their lot between the high water line and the upland vegetation line. The Hays appealed an adverse judgment below to the state supreme court. Instead of deciding the case on the grounds won and appealed upon, the *Thornton* court, sua sponte, decided it on the basis of custom:

Because many elements of prescription are present in this case, the state has relied upon the doctrine in support

of the decree below. We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.<sup>170</sup>

The court noted that the general public had enjoyed the dry-sand area since the beginning of the state's political history, and before that "aboriginal inhabitants" had used the beach for clam digging and for cooking fires. Furthermore, from the earliest times, the general public had assumed that this area was part of the public beach, used for picnics, gathering wood, building fires, and so forth. Local officials policed it, and local sanitary crews kept it clean. Therefore, the entire dry-sand beach area in the state of Oregon was henceforth subject to a public recreational easement based on the doctrine of custom. It did not matter that the custom, declared to be essentially English in nature, was neither "immemorial" nor limited to a town or village: "[b]ut it does not follow that a custom, established in fact, cannot have regional application and be enjoyed by a larger public than the inhabitants of a single village."<sup>171</sup> The court so found without any court hearing or objective findings of custom below—the heart of the Blackstonian finding of custom according to the seven criteria described in the *Commentaries*.

With all due respect to the courts of the several states which appear to be creating property rights from Blackstonian custom, they ignore the basis and essence of such custom, at least according to the seven criteria which Blackstone describes in his commentaries. Hawaii also blithely ignores at least one such criterion in its opinion and ignores others—particularly certainty and reasonableness, and arguably continuity. It also plays fast and loose with the Blackstonian injunction, supported by Coke centuries before, that it is impossible to derive a right to take something from land—know as a profit a pendre—from custom.<sup>172</sup>

The Oregon Supreme Court at least makes a stab at going through the seven criteria. However, it mistakes the critical requirements of reasonableness and certainty, even as described in the *Commentaries*. The court says:

The fourth requirement, that of reasonableness, is satisfied by the evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community. . . . The fifth requirement, certainty, is satisfied by the visible boundaries of the dry sand area and by the character of the land, which limits the use thereof to recreational uses connected with the foreshore.<sup>173</sup>

This is not, by any means, what Blackstone meant, nor did cases before, contemporary with, and after his time support such an interpretation.

164. *Id.* at 153.

165. 6 Q.B. 383 (1844).

166. 593 S.W.2d 372 (Tex. Ct. App. 1979).

167. 767 S.W.2d 957 (Tex. Ct. App. 1989), *cert. denied*, 493 U.S. 1073 (1989); *see also* *United States v. St. Thomas Beach Resorts, Inc.*, 386 F. Supp. 769 (D.V.I. 1974), *aff'd*, 529 F.2d 513 (1974).

168. 16 OR. REV. STAT. §390.610 (2)-(4) (1969).

169. 462 P.2d 671 (Or. 1969).

170. *Id.* at 676.

171. *Id.* at 678 n.6.

172. *See infra* note 190 and accompanying text; Sullivan, *supra* note 6, at 146-47; 12 (1) HALSBURY'S LAWS OF ENGLAND (1998), at 631-32.

173. 462 P.2d at 671.



Twenty-five years later, in *Stevens*,<sup>174</sup> the Oregon Supreme Court revisited customary law, this time explicitly holding custom to be a *Lucas*-exemption background principle of state law. There, the town of Cannon Beach refused to issue a seawall permit because it would block access to the dry-sand beach in derogation of the customary rights of the public which the court had established in *Thornton*. To the Stevens' Fifth Amendment inverse condemnation (takings) claim, the court responded that the customary law of Oregon was a background principle of state property law under *Lucas* and therefore an exception to the *Lucas* categorical rule with respect to takings of all economically beneficial use.<sup>175</sup> In both *Thornton* and *Stevens*, therefore, the right to exclude the public was never a part of the landowners' titles to begin with. Of course, just when and how the Hays and other similarly situated landowners were to apprehend that their dry-sand beach land was subject to such a customary easement, because they all purchased their land before the *Thornton* decision, the court does not really say.

The Stevens unsuccessfully applied for *certiorari* to the Supreme Court. Unremarkably (given his excoriation of environmental protection in *Lucas*), Justice Scalia dissented from the denial. First taking issue with the Oregon court's characterization of its customary law as a *Lucas* exception, Scalia noted that while a state is *generally* free to define property rights under state and not federal law, nevertheless:

[A] State may not deny rights protected under the Federal Constitution . . . by invoking a nonexistent rule of State substantive law. Our opinion in *Lucas* . . . would be a nullity if anything that a State court chooses to denominate "background law" . . . could eliminate property rights.<sup>176</sup>

As to application of such a questionable "custom" in this case:

To say that this case raises a serious Fifth Amendment takings issue is an understatement. The issue is serious in the sense that it involves a holding of questionable constitutionality; and it is serious in the sense that the land-grab (if there is one) may run the entire length of the Oregon coast.<sup>177</sup>

Justice Scalia focused on the Supreme Court of Oregon's decision in *McDonald v. Halvorson*,<sup>178</sup> in which the court "revisited the issue of dry-sand beach . . ." The *McDonald* court "noted what it called inconsistencies in *Thornton*" and stated that "'nothing in [Thornton] fairly can be read to have established beyond dispute a public claim by virtue of 'custom' to the right to recreational use of the entire Oregon coast.'" <sup>179</sup> Scalia concluded that:

There [was] no testimony in this record showing use of the narrow beach on the bank of the cove. . . . The doctrine of custom announced in [Thornton] simply does not apply to this controversy . . . because there is no factual predicate for application of this doctrine.<sup>180</sup>

Scalia suggested that the *Lucas* categorical rule precluded limitations from being newly legislated or decreed without compensation under the Fifth Amendment. In essence, this "new-found 'doctrine of custom' is a fiction,"<sup>181</sup> requiring compensation.

## Hawaii

Hawaii is a harder, and certainly more sweeping, situation. Hawaii presents more difficulty because there is no question that some tradition of some customary rights exists, associated with native Hawaiians from the days of the various kingdoms, including gathering, access, and religious customary practices. This tradition predates not only statehood, but also territorial days and annexation toward the end of the 19th century. However, in 1858, the state's highest court declared that most, if not all, native customary rights had been extinguished by a series of acts of the constitutional monarchy established earlier in the century. In *Oni v. Meek*,<sup>182</sup> the Hawaii Supreme Court rejected a claim of pasturage based on pre-1850 customary rights on the ground that an 1850 statute, later codified in principle as Hawaii Revised Statutes (H.R.S.) 7-1, enumerated all the rights which tenants had in those lands which they did not "own." A logical conclusion: all other traditional rights, customary and otherwise, were terminated.<sup>183</sup> The holding of the court on custom is instructive: "[I]t is obvious to us that the custom contended for is so unreasonable, so uncertain, and so repugnant to the spirit of the present laws, that it ought not to be sustained by judicial authority."<sup>184</sup>

Indeed, language seemingly to the contrary in various statutes and declarations almost certainly refer to rights, as compared to mere usage, other than customary rights in the English sense. In fact, in *Territory v. Liliuokalani*,<sup>185</sup> the Territorial Supreme Court specifically rejected a broad definition of such customary rights in favor of one with a well-understood meaning as used in conveyances within the territory; "reserving however, the people's kuleana therein"<sup>186</sup> meant the reservations of house lots and taro patches or gardens of natives lying within the boundaries of the tract granted.

Both before and after statehood, courts in the main limited customary law in Hawaii to statutory rights to gather certain plant products listed in H.R.S. 7-1. Attempts to expand such rights by the state supreme court, by permitting *kamaaina* testimony (verbal history by indigenous people) to modify seaward land boundaries of private landowners,<sup>187</sup> was soundly rejected by the federal district court in *Sotomura v. County of Hawaii*.<sup>188</sup> Finding no credible evidence justifying relocation of the seaward boundary, the court observed:

The Court fails to find any legal, historical, factual or other precedent or basis for the conclusions of the Ha-

174. 854 P.2d 449, 24 ELR 20913 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994).

175. *Id.* at 456, 24 ELR at 20916.

176. 114 S. Ct. at 1333.

177. *Id.* at 1335.

178. 780 P.2d 714 (Or. 1989).

179. 114 S. Ct. at 1335 (citing *McDonald*, 780 P.2d at 724).

180. *Id.* (emphasis added).

181. *Id.*

182. 2 Haw. 87 (1858).

183. See Sullivan, *supra* note 6.

184. 2 Haw. at 90.

185. 14 Haw. 88 (1902), also available at 1902 WL 1354, at \*1 (Hawaii Terr.).

186. *Id.* at 95, 1902 WL 1354, at \*6-8.

187. See Application of Ashford, 440 P.2d 76 (Haw. 1968).

188. 460 F. Supp. 473 (D. Haw. 1978).

waii Supreme Court that, following erosion, the monument by which the seaward boundary of seashore land in Hawaii is to be fixed is the upper reaches of the waves. To the contrary, the evidence introduced in this case firmly establishes that the common law, followed by both legal precedent and historical practice, fixes the high water mark and seaward boundaries with reference to the tides, as opposed to the run or reach of the waves on the shore.<sup>189</sup>

The district court found that there was no evidence of the public use that the state argued ripened into a customary right.

Almost 20 years later the Hawaii Supreme Court, in *Public Access Shoreline Hawaii v. Hawaii County Planning Commission (PASH)*,<sup>190</sup> declared that traditional and customary rights of native Hawaiians may be practiced on public and private land, both undeveloped and substantially developed, anywhere in the state. The court also held that government agencies must consider the effect on such customary rights in deciding on applications for development permits. Claiming to build on previous decisions first limiting customary rights to those specifically enumerated in a statute,<sup>191</sup> the court suggested in dicta that courts could go beyond the statutory enumeration on the ground of custom where the Hawaiian practice does no harm and can be demonstrably shown to have been continued within a certain land division. This extension is arguably contrary to the express holding in *Oni*. The court later found such customary rights could in certain circumstances be exercised outside such a land division if the custom to do so could be proven.<sup>192</sup> Finally, the court opined that western notions of property law, particularly that of exclusivity, might not be applicable in Hawaii, particularly in the face of a conflicting "customary" right exercised by native Hawaiians: "We hold that common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state."<sup>193</sup>

Granting that Hawaii has a constitutional provision providing for state protection of all "rights customarily and traditionally exercised for subsistence, cultural and religious purposes" limited to ahupuaa (land division) this is still an elevation of custom over common law that has no basis whatsoever in historical definitions of custom. Further granting that Hawaii has a rich tradition of native practices some of which rise to the level of custom (as compared to mere usage) gets us a bit further, but only a bit. The court simply asserts that, contrary to the historical record, customary practices go beyond those in HRS 1-1 and were not extinguished by the various mid-19th century statutes and laws that created the "western" concept of property in Hawaii which the court derides.<sup>194</sup> The court picks and chooses among elements of traditional custom, particularly disre-

garding or redefining elements of consistency, certainty, and reasonableness<sup>195</sup> in reaching a decision based on customary law that goes far beyond the Oregon cases, "finding" customary rights in 20 percent of Hawaii's citizens over every square foot of land in the state, whether or not developed,<sup>196</sup> and regardless of the nature or form of land ownership. It is no wonder that title companies in Hawaii now typically exclude from their coverage any rights that are or may be asserted by native Hawaiians.

As to whether such new "findings" of customary rights in derogation of fundamental "western" concepts of property rights could be a taking of property without compensation, best to let the court speak for itself:

[Property owner] argues that the recognition of traditional Hawaiian rights beyond those established in *Kalipi* and *Pele* would fundamentally alter its property rights. However, [property owner's] argument places undue reliance on western understandings of property law that are not universally applicable in Hawaii. Moreover, Hawaiian custom and usage have always been a part of the laws of this State. Therefore, our recognition of customary and traditional Hawaiian rights . . . does not constitute a judicial taking.<sup>197</sup>

The Hawaii Supreme Court recently clarified its decisions regarding custom in two decisions. The first is a per curiam memorandum opinion, *Trustees of the Office of Hawaiian Affairs v. Board of Land & Natural Resources of the State of Hawaii*.<sup>198</sup> In holding that the state land board failed to protect traditional native Hawaiian rights when the Board granted a conditional use permit to dredge a channel through state land, the court concluded that the Board failed to make definitive findings or conclusions as to the exercise of native Hawaiian rights in the subject area. The court held it was necessary for the Board to make express findings as to the existence and extent of customary and traditional rights and, if a permit to dredge would impair these rights, to determine whether such impairment "is justified." The Board had noted in its challenged findings that the subject shoreline areas were used by Hawaiians and others for fishing and picking shellfish, but that the proposed dredge area was not rich in aquatic life and the location of the proposed channel entrance was not an especially good spot for fishing, gathering, or other traditional and customary activities by Hawaiians. The Board further found that conditions imposed by other agency permits would adequately protect and preserve access for traditional and customary practices of Hawaiians to the extent required by law. Despite all this, the court held the findings insufficient under its *PASH* ruling.

The second is *Hawaii v. Hanapi*.<sup>199</sup> Alapai Hanapi, a native Hawaiian, was arrested for trespassing on the oceanfront land of his neighbor (a well-known trial lawyer). The land is improved with a single-family house. The neighbor was engaged in removing fill from the shore and water, illegally deposited without required permits, apparently to develop a boat landing. Hanapi entered the neighbor's prop-

189. *Id.* at 480.

190. 903 P.2d 1246 (Haw. 1995).

191. See *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745 (Haw. 1982).

192. See *Pele Defense Fund v. Paty*, 837 P.2d 1247 (Haw. 1992) (holding that Pele (volcano goddess) worshippers could go on private land to conduct their worship ceremonies even if outside the ahupua'a (land division upon which they traditionally lived and/or worshipped), if the custom exercised so permitted).

193. *PASH*, 903 P.2d at 1269.

194. "[T]he western concept of exclusivity is not universally applicable in Hawaii." *Id.* at 1268.

195. *Id.*

196. "Depending on the circumstances of each case, once land has reached the point of 'full development' it may be inconsistent to enforce the practice of traditional Hawaiian gathering rights on such property." *Id.* at 1272 (emphasis added).

197. *Id.*

198. No. 19774 (Mar. 12, 1998).

199. 970 P.2d 485 (Haw. 1998).

erty without permission to monitor the "restoration" of the beach and wetland, claiming he was exercising native Hawaiian rights. Hanapi had made the original complaint, partly on the basis that the fill was adversely affecting native fishponds adjoining his property, at which he and his family claimed to practice traditional religious, gathering, and sustenance activities. When Hanapi refused to leave, the foreman supervising the project called the police, and Hanapi was arrested for trespassing. He was convicted after trial at which he represented himself.

In sustaining Hanapi's conviction, the court began by observing that one limitation on private property "would be that constitutionally protected native Hawaiian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes."<sup>200</sup> However, the court held that Hanapi had failed to establish that his claimed native Hawaiian right was a customary and traditional practice as required. The court set out three "factors" that Hanapi and others claiming such rights must "show":

- qualify as a native Hawaiian within the *PASH* guidelines (descendants of native Hawaiians who inhabited the islands prior to 1778);
- establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice (need not be enumerated in statute or constitution, however);
- exercise of the right occurred on undeveloped or less than fully developed property (not further defined in *PASH*).

Applying these factors to Hanapi, the court held that if property is zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is "always inconsistent" to permit the practice of traditional and customary native Hawaiian rights on such property. This represents a retreat from earlier language in *PASH*. In a footnote, the court noted "there may be other examples of fully developed property as well where the existing uses of the property may be inconsistent with the exercise of protected native Hawaiian rights."<sup>201</sup>

The court based its decision not on the above holding, however, but rather on the inadequacy of Hanapi's "foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice. Here, Hanapi did not offer any explanation of the history or origin of the claimed right."<sup>202</sup> Noting that there was sufficient evidence in the record to support Hanapi's conviction for criminal trespass and in the absence of a native Hawaiian rights defense, the court affirmed the judgment below finding Hanapi guilty.

### *Custom: A Conclusion*

In sum, the law of custom appears to be growing anew. States appear to be using custom as a defense against the categorical taking rule announced in *Lucas*, by way of one of its two exceptions: background principles of state property law. The revised doctrine of custom, however, bears little resemblance to Blackstone's law of custom, to which both the Oregon and Hawaii courts refer:

Because so much of our law is the product of legislation, we sometimes lose sight of the importance of custom as a source of law in our society. It seems particularly appropriate in the case at the bar to look to an ancient and accepted custom in this state as the source of a rule of law.<sup>203</sup>

Custom is arising Phoenix-like from the ashes of Blackstone's limitations on the English common law which forms the basis of common law in the United States. It arises both from renewed interest in the rights of Native Americans and from the background principles of state property law exception to the doctrine of regulatory taking. In the first, custom can provide a means for guaranteeing certain rights of native peoples in lands owned (technically held in fee simple) by others. The argument that a true customary right survives transfer from one owner to another is strong (though, as the cases in the foregoing sections demonstrate, custom is always subject to control and destruction by legislative act). In the second, custom can provide a basis for a local, state, or federal land use regulation which will survive constitutional challenge as a taking of property without compensation even if it leaves a landowner with no economically beneficial use of the land. Akin to its twin nuisance exception, such a background principle of a state's law of property is not a part of the landowner's bundle of ownership sticks to begin with, so that its "taking by regulation"—like the perpetration of a nuisance—is not protected by the Constitution's Fifth Amendment.

Property rights, however, and particularly private-property rights, are hedged with restrictions governing such rights in land of another like easements, profits, licenses, and covenants. One with no right to enter the land of another is a trespasser, as is demonstrated by the majority of the land cases cited and quoted in the preceding sections (where the action was almost always one in trespass against the intruder who plead custom and customary rights as a defense). This right to exclude is a critical part of American jurisprudence with respect to private-property rights. As the American Law Institute noted in its *Restatement of the Law of Property*:

A possessory interest in land exists in a person who has a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land.<sup>204</sup>

Another commentator describes the "notion of exclusive possession" as "implicit in the basic conception of private property."<sup>205</sup> The Supreme Court has many times made the same point. Thus, in *Kaiser Aetna v. United States*<sup>206</sup>:

In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the . . . servitude . . . will result in an actual physical invasion of the privately owned

200. *Id.* at 492.

201. *Id.* at 495.

202. *Id.*

203. Oregon ex rel. Thornton v. Hay, 462 P.2d 671 (Or. 1969).

204. RESTATEMENT OF PROPERTY §7 (1936).

205. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 63 (1985).

206. 444 U.S. 164, 10 ELR 20042 (1979).

marina. And even if the Government physically invades only an easement in the property, it must nonetheless pay just compensation.<sup>207</sup>

Again, in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>208</sup>:

Moreover, an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. As [another part of the opinion] indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent or nature of the invasion.<sup>209</sup>

Indeed, the right to exclude has achieved international status with the 1999 opinion of the European Court of Human Rights in *Case of Chassagnou and Others v. France*.<sup>210</sup> Before the Court was the French *Loi Verdeille*<sup>211</sup> which provides for the statutory pooling of hunting grounds. The effect on the plaintiffs (three farmers) was to force them to become members of a municipal hunters' association and to transfer hunting rights to the association, with the result that all members of the association may enter their property for the purpose of hunting.<sup>212</sup> The government of France claimed that the interference with the applicants' property rights was minor since they had not been deprived of the right to use their property and all they lost was the right to prevent other people from hunting on their land.

However, the Court found that while it was "undoubtedly in the general interest to avoid unregulated hunting and encourage the traditional management of game stocks,"<sup>213</sup> (clearly the purpose of the *Loi Verdeille*) the interference with the applicants' fundamental right to peaceful enjoyment of their land was "disproportionate":

[N]otwithstanding the legitimate aims of the *Loi Verdeille* when it was adopted, the Court place the applicants in a situation which upsets the fair balance to be struck between protection of the right of property and the requirements of the general interest. Compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified.<sup>214</sup>

Such obvious intrusions on private property—in particular the well-documented right to exclude needs—must comply with certain restrictions and criteria common to the concept of custom. Blackstone provides such criteria, not only as a matter of reason, but as a matter of law since he is almost al-

ways cited in the reported American cases on custom and customary law.

As the discussion in the introductory section of this Article demonstrates, the courts usually get it wrong. Of the seven criteria set out in the *Commentaries*, the most critical appear to be certainty, reasonableness, and continuity. Contrary to the language in the *Thornton* case from Oregon, reasonableness is not a matter of present use but of original legal unfairness at its inception. Customs that unduly burden property rights of the landowner or which favor unduly one group or person over others are unreasonable. If a custom is reasonable in these terms at its inception, then it is reasonable. Thus the court's statement that "reasonableness is satisfied by the evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community"<sup>215</sup> is beside the point, irrelevant, and wrong.

The Blackstonian criterion of certainty goes to the clarity of the customary practice or right, the restrictive certainty as to locale (some legally recognized division like a county, a city, a town, or a village) and certainty as to a class of persons or section of the public. The *Thornton* court's statement that "certainty is satisfied by the visible boundaries of the dry sand area and by the character of the land, which limits the use thereof to recreation uses connected with the foreshore"<sup>216</sup> is vague as to the first requirement, far too broad with respect to the second, and altogether fails to deal with the third.

As to continuity, the court says that a "customary right need not be exercised continuously, but it must be exercised without an interruption caused by anyone possessing a paramount right."<sup>217</sup> True for the first part, false for the second part. As Blackstone (and the cases) make abundantly clear, it is the *right* of use which must be continuous. The use itself goes to evidence of that continuity of right, but the use itself is otherwise irrelevant.

To sum up, American courts cite (appropriately) Blackstone when finding custom as a basis for permitting what would otherwise be a trespass on private land. Unfortunately, they usually get it so wrong that the basis in custom must certainly fail. Without another basis for justifying such invasive intrusions on private property, those exercising such rights are trespassing, and governments that permit (or require) such trespass are taking private property without compensation contrary to the Fifth Amendment of the Constitution.

## Public Trust and Background Principles

Broadly stated, the public trust doctrine provides that a state holds public trust lands, waters, and living resources in trust for the benefit of its citizens, establishing the right of the public to fully enjoy them for a variety of public uses and purposes.<sup>218</sup> Implied in this definition are limitations on the private use of such waters and land, as well as limitations on the state to transfer interests in them, particularly if such transfer will prevent public use. Such definitions and duties

207. *Id.* at 179-80, 10 ELR at 20046 (citations omitted).

208. 458 U.S. 419 (1982).

209. *Id.* at 436 (citations omitted; emphasis included). See Callies, *supra* note 5, at 526-29.

210. 1999 Eur. Ct. H.R. (25088/94, 28331/95, and 28443/95) (Apr. 29, 1999).

211. Law No. 64-696 of July 10, 1964.

212. *Supra* note 210, at para. 13.

213. *Id.* at para. 79.

214. *Id.* at para. 85.

215. 462 P.2d 671, 677 (Or. 1969).

216. *Id.*

217. *Id.*

218. COASTAL STATES ORGANIZATION, INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra* note 7, at 1.

analytically flow from the dual nature of title in public trust lands and waters. On the one hand, the public has the right to use and enjoy the land and water—the *res* of the trust—for such activity as commerce, navigation, fishing, bathing and related public purposes. This is the so-called *jus publicum*. On the other hand, since according to one source, fully one-third of public trust property is in private rather than public hands,<sup>219</sup> private-property rights exist in many such trust lands and water. This is the so-called *jus privatum*.<sup>220</sup>

The principal problem, of course, is the extent to which the public trust doctrine can result in the elimination of such private-property rights absent compensation, contrary to the Fifth Amendment. Obviously, any recognized public rights in private land would stand on a footing similar to an easement, leasehold, covenant burden, license, or other recognized private-property right in the land of another: a limitation or restriction on the title of and, usually, use by the landowner. In this sense, the public trust represents a category of rights which may not have been part of the landowner's title to begin with, thereby falling into the "background principles of state property law" exception to the categorical taking rule described in Part I.<sup>221</sup>

The taking issue arises most frequently, however, when a state court or legislature "re-affirms" the public's trust "rights" on private property. This occurs when a state: "1) imposes restrictions on privately-held trust lands; 2) requires public access across private land for access to trust lands or water; and 3) expands the scope of public activities permitted under the guise of public trust rights."<sup>222</sup> Most public trust lands are submerged, tidal, or "water-flowed." This explains why the vast majority of controversies over the application of the public trust doctrine involve water rights and the use of submerged lands.<sup>223</sup> While private land use or development thereon is marginal, there is a growing tendency of courts to expand the application of the public trust doctrine to "dry-sand" and other more useable and developable areas.

What follows briefly summarizes and analyzes the landmark cases establishing modern and potentially expansive notions of the public trust doctrine. The analysis is followed by a discussion of select, relatively recent cases expanding the doctrine to "dry land" from traditional submerged and waterfront lands, together with a summary of those few cases which recently demonstrate limitations on the doctrine in the face of takings challenges. As some of these decisions demonstrate, courts are often confronted with a legislative act, usually a state statute designed to protect and conserve coastal zones, which purports either to grant or restrict rights in land. Application of public trust principles then results either in voiding all or part of a transfer of public lands to a private owner, or the upholding (or not) of a restrictive regulatory statute on the ground that most or all of the restrictions simply restate public trust limitations on private land impressed with such a trust.

### *The Modern Classics: Where It All Began*

The undisputed font and source of the modern public trust doctrine is *Illinois Central Railroad Co. v. Illinois*.<sup>224</sup> The railroad claimed title to 1,000 acres of submerged lands under Lake Michigan (which it proposed to fill and develop) stretching for nearly a mile along Chicago's shoreline. It obtained title under a specific fee simple grant from the Illinois legislature. Finding that navigable waters and the lands under them were held by the state in trust for the public, the Supreme Court held that the state could not convey or otherwise alienate them in fee simple, free of the public trust impressed upon them. The state could, however, sell small parcels of public trust land the use of which would promote the public interest (e.g., docks, piers, and wharves), so long as this could be done without impairing the public interest in the remaining submerged land and water.<sup>225</sup>

Because the legislature conveyed the land in fee simple in apparent disregard of its public trust responsibilities and the trust imposed on such lands, the sale was void.<sup>226</sup> The case now stands for the proposition that only the *jus privatum*, as compared with the *jus publicum*, can be transferred by the state, and, inversely, that the *jus publicum* can never be part of a private title to property. An example of the kind of private use which can be made of public lands comes from Idaho in *Kootenai Environmental Alliance, Inc. v. State Board of Land Commissioners*.<sup>227</sup> The Idaho Supreme Court approved leasing state lands impressed with a public trust to a private club for the construction, maintenance, and use of private docking facilities on a bay in a navigable lake. While noting extensive experience in California and Wisconsin with respect to private use of public trust lands, the court held that the lease (not a fee simple transfer) was "not incompatible" with the public trust imposed on the property "at this time."<sup>228</sup>

Nearly a century later, the Supreme Court expanded the physical reach of the public trust doctrine from submerged lands under navigable waterways, like Lake Michigan, to all lands under waters influenced by the ebb and flow of the tides in *Phillips Petroleum Co. v. Mississippi*.<sup>229</sup> The Court rejected private fee simple titles extending back to pre-statehood Spanish land grants that were held by Phillips Petroleum and its predecessors for over 100 years, and upon which the company had paid taxes as if held in fee simple. Instead, the Court held that title to these lands, often exposed for long periods of time, passed to the state of Mississippi upon its entry into the union, under the "equal footing" doctrine.<sup>230</sup> According to the Court, "States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."<sup>231</sup> A strong three-justice dissent, comprised of Justices O'Connor, Stevens, and Scalia, expressed alarm that the Court's holding "will disrupt the settled expectations of landowners not only in Mississippi but in every coastal

219. *Id.* at 230.

220. *Id.* at 2.

221. See DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 101-02 (1994).

222. *Id.* at 357.

223. See, e.g., ARCHER ET AL., PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS, *supra* note 7, and the dozens of cases cited therein. See also *id.* and the extensive table of cases listed by category appended to the end of the volume.

224. 146 U.S. 387 (1892).

225. *Id.* at 450-64.

226. *Id.* at 454-55.

227. 671 P.2d 1085 (Idaho 1983).

228. *Id.* at 1094.

229. 484 U.S. 469, 18 ELR 20483 (1988).

230. *Id.* at 479-82, 18 ELR at 20483-84.

231. *Id.* at 479, 18 ELR at 20484.

State."<sup>232</sup> By substantially expanding traditional public trust rights beyond navigable waters and bays immediately adjoining them, the decision, argued the dissent, would extend the state's public trust interests to tidal, nonnavigable waters including bodies remote from and only indirectly connected to the ocean or navigable tidal waters. The practical effect was that thousands of leaseholders of tidal lands could be displaced because over nine million acres of land were classified as fresh or saline wetlands, arguably now subject to the state's control under the public trust doctrine.<sup>233</sup>

### *Extending the Public Trust: Selected Examples*

Perhaps the most famous of the relatively recent case law is *Orion Corp. v. State*.<sup>234</sup> The landowner planned to build a residential community on dredged and filled tidelands and submerged lands; however, after it purchased the land, the state of Washington adopted a series of coastal and tideland laws limiting the landowner's use of recreation and aquaculture. The landowner claimed the restrictions amounted to a taking of property by regulation.

Applying the then-current federal standard for takings set out in *Penn Central Transportation Co. v. City of New York*,<sup>235</sup> the court held that Orion could have had no investment-backed expectations with respect to the residential development. Because the state held original title to all of Washington's shoreline, any transfer of shoreline property was impressed with a public trust which, of course, could not be alienated. The court, however, noted that the state's tideland regulations were more restrictive in terms of private land use than would result from reasonable application of the public trust doctrine. Therefore, to the extent the regulations only prohibited uses that would be prohibited under the public trust doctrine, no regulatory taking could occur. But to the extent the regulations were more restrictive, a regulatory taking would occur if they denied the landowner all economically viable use of the property. Interestingly, the court foreshadowed the *Lucas* per se, categorical test.

Similarly, a California court, in *National Audubon Society v. Superior Court of Alpine County*,<sup>236</sup> rejected a takings claim on the ground that the imposition of public trust restrictions amounted to a taking of property without compensation:

Once again we rejected the claim that establishment of the public trust constituted a taking of property for which compensation was required: "We do not divest anyone of title to property; the consequence of our decision will be only that some landowners whose predecessors in interest acquired property under the 1870 act will, like the grantees in [*People v. California Fish*, 166 Cal. 576 (1913)] hold it subject to the public trust."<sup>237</sup>

At about the same time as the California and Washington supreme courts were declaring public trust rights in private

land, the New Jersey courts were expanding the reach of the public trust doctrine to dry-sand beach areas in much the same way as the Oregon courts had done in *Thornton* and *Stevens*, but this time using public trust rather than custom. In *Matthews v. Bay Head Improvement Ass'n*,<sup>238</sup> the New Jersey Supreme Court held that the public trust doctrine extends to dry-sand beach areas for both access to and limited use of the ocean and foreshore (traditional public trust areas).

The bathers' right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry[-]sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the waters' edge. . . . The unavailability of the physical sites for such rest and relaxation would seriously curtail and in many situations eliminate the right to recreational use of the ocean . . . where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the [public trust] doctrine warrants the public's use of the upland dry[-]sand area subject to an accommodation of the interests of the owner.<sup>239</sup>

In New Jersey, there is a consistent pattern of permitting public access to beaches despite attempts by landowners, either public or private, to prevent such access to their beaches.<sup>240</sup> The public trust doctrine has been applied to all manner of property to prevent such development as the construction of schools on public park land and the preservation of national monuments.<sup>241</sup> Also, New York found public trust to be a principle basis for statutory land use restorations on private property contained in the Long Island Pine Barrens Protection Act.<sup>242</sup> These rulings, however, are somewhat tangential to the takings thrust of this Article.

### *Limiting the Public Trust: Selected Examples*

Not all courts have been so quick as to accept extensions or declarations of public trust as a basis for restricting the use of private property in the face of takings challenges. Aside from the limitation on regulations which go beyond public trust principles, as in the *Orion* case discussed in the previous section, the Maine Supreme Court has held that attempts to expand "traditional" public trust access for purely recreational purposes may be challenged as takings. In *Bell v. Town of Wells Beach*,<sup>243</sup> the court held that attempts to traverse private lands to reach public land for recreational purposes in accordance with the state's Public Trust and Intertidal Land Act resulted in a taking of private property without compensation. Traditional public trust access purposes, according to the court, would be for fishing, fowling, and navigation.

238. 471 A.2d 355 (N.J. 1984).

239. *Id.* at 365.

240. See *Lusardi v. Curtis Point Property Owners Ass'n*, 430 A.2d 881, 12 ELR 20073 (N.J. 1981); *Van Ness v. Borough of Deal*, 393 A.2d 571 (N.J. 1978); *Hyland v. Borough of Allenhurst*, 372 A.2d 1133 (N.J. 1977).

241. See *Johanna Searle, Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine*, 41 S.C.L. REV. 897, 909 (1990).

242. *WJF Realty v. New York*, 672 N.Y.S.2d 1007 (1998).

243. 557 A.2d 168 (Me. 1989).

232. *Id.* at 485, 18 ELR at 20486 (O'Connor, J., dissenting).

233. *Id.* at 493-94, 18 ELR at 20489.

234. 747 P.2d 1062, 18 ELR 20697 (Wash. 1987) (en banc), cert. denied, 486 U.S. 1022 (1988).

235. 438 U.S. 104, 8 ELR 20528 (1978).

236. 658 P.2d 709, 13 ELR 20272 (Cal. 1983).

237. *Id.* at 723, 13 ELR at 20278 (citing *City of Berkeley v. Superior Court of Alameda County*, 26 Cal. 3d 515, 532, 10 ELR 20394, 20399 (Cal. Sup. Ct. 1980)).



Similarly, the Massachusetts Supreme Court, while reaffirming the public's right to use the intertidal zone for fishing, fowling, and navigation, refused to expand statutory declarations of public trust to permit so much as access across private land to reach such intertidal lands in *Opinion of the Justices*.<sup>244</sup> In holding proposed legislation to reserve such rights of way a probable taking, the court said:

The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase possible under the Constitutions of the Commonwealth and the United States . . . . The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest in real property has any meaning at all it must include the general right to exclude others.<sup>245</sup>

To the same effect is the opinion of the New Hampshire Supreme Court in *Opinion of the Justices (Public Use of Coastal Beaches)*.<sup>246</sup> In responding to a new statute that provided for access to tide-flowed public trust shoreline across abutting private land, the court said:

When the government unilaterally authorized a permanent, public easement across private lands, this constitutes a taking requiring just compensation. . . .

. . . Because the bill provides no compensation for the landowners whose property may be burdened by the general recreational easement established for public use, it violates the prohibition contained in our State and Federal Constitutions against the taking of private property for public use without just compensation. Although the State has the power to permit a comprehensive beach access and use program by using its eminent domain power and compensating private property owners, it may not take property rights without compensation through legislative decree.<sup>247</sup>

The New Hampshire Supreme Court drove home those advisory points in *Purdie v. Attorney General*.<sup>248</sup> There, 40 beachfront property owners sued the state alleging a taking of their property when the state established a statutory boundary line defining public trust lands further inland from the mean high watermark. The language of the court is instructive:

Having determined that New Hampshire common law limits public ownership of the shorelands to the mean high water mark, we conclude that the legislature went beyond common law limits by extending public trust rights to the highest high water mark. . . . Property rights created by common law may not be taken away legislatively without due process of law. Because [the state statute] unilaterally authorizes the taking of private shoreland for public use and provides no compensation to landowners whose property has been appropriated, it violates [the state constitution] and the Fifth Amendment of the Federal Constitution against the taking of property for public use without just compensation. . . . *Although it may be desirable for the State to expand public beaches to cope with increasing crowds, the State may not do so without compensating affected landowners.*<sup>249</sup>

### Custom and Public Trust as Background Principles After *Lucas*: A Tentative Summing Up

What rule or standard can be carved from these few cases that could be applied to the law of takings after *Lucas*? Clearly, some members of the Supreme Court are concerned about the damage to fee simple titles resulting from sudden declarations or physical extensions of the public trust doctrine. Simultaneously, a minority of the Court is concerned about the sudden "finding" of customary rights exercisable by the general public over large areas of land. Nonetheless, the majority of the Court appears unwilling to review such sudden shifts in favor of public rights at the cost of private restriction on regulatory taking theories, even after *Lucas*.

Without federal cases to the contrary, it seems clear that government has available public trust, like custom—hopefully real custom, not custom that is custom-made to fit a particular fact pattern—as a "background principle" defense to a regulatory taking, even if the landowner is left with no economically beneficial use of the relevant parcel. Of course, as intimated by Washington's *Orion* court, statutes that prohibit more uses than would be prohibited under the application of public trust principles will have to be defended under another doctrine or they may result in regulatory takings. Presumably, the same is true with respect to custom. The latter will often result in landowner difficulties in excluding those entitled to exercise customary rights from private property, but only rarely should the application of custom result in undevelopable land.

244. 313 N.E.2d 561 (Mass. 1974).

245. *Id.* at 568.

246. 649 A.2d 604 (N.H. 1994).

247. *Id.* at 611.

248. 732 A.2d 442 (N.H. 1999).

249. *Id.* at 447 (citing *Opinion of the Justices*, *supra* note 246) (emphasis added).